SUPREME COURT

OF THE

STATE OF CONNECTICUT

S.C. 19376

MERSCORP HOLDINGS, INC., ET AL.
PLAINTIFFS-APPELLANTS

V.

DANNEL P. MALLOY, GOVERNOR, STATE OF CONNECTICUT, ET AL.
DEFENDANTS-APPELLEES

BRIEF OF DEFENDANTS-APPELLEES
WITH ATTACHED APPENDIX

FOR THE DEFENDANTS-APPELLEES:

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STATEMENT OF ISSUES

1. Did the trial court correctly conclude that Conn. Gen. Stat. §§ 7-34a(a)(2) and 49-10(h), as amended by §§ 97 and 98 of No. 13-184 of the 2013 Public Acts and §§ 81 and 82 of No. 13-247 of the 2013 Public Acts, do not violate the plaintiffs' rights to the equal protection of the laws under the United States and Connecticut Constitutions (U.S. Const., amend. XIV and Conn. Const. art. I § 20)?

2. Did the trial court correctly conclude that Conn. Gen. Stat. §§ 7-34a(a)(2) and 49-10(h), as amended by §§ 97 and 98 of Public Act 13-184 and §§ 81 and 82 of Public Act 13-247, do not violate the plaintiffs' rights to substantive due process under the United States and Connecticut Constitutions (U.S. Const. amend XIV and Conn. Const. art. I, §§ 8, 10)?

3. Did the trial court correctly conclude that Conn. Gen. Stat. §§ 7-34a(a)(2) and 49-10(h), as amended by §§ 97 and 98 of Public Act 13-184 and §§ 81 and 82 of Public Act 13-247, do not violate the plaintiffs' rights under the Commerce Clause of the United States Constitution (U.S. Const. art. I, § 8)?

4. Did the trial court correctly conclude that Conn. Gen. Stat. §§ 7-34a(a)(2) and 49-10(h), as amended by §§ 97 and 98 of Public Act 13-184 and §§ 81 and 82 of Public Act 13-247, do not violate the prohibition on Bills of Attainder under the United States Constitution (U.S. Const. art. I, § 10)?

5. Did the trial court correctly conclude that the implementation of Conn. Gen. Stat. §§ 7-34a(a)(2) and 49-10(h), as amended by §§ 97 and 98 of Public Act 13-184 and §§ 81 and 82 of Public Act 13-247, was not actionable under 42 U.S.C. §§ 1983 and 1988(b), because there is no underlying constitutional violation based on the claims above?

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COUNTER STATEMENT OF FACTS

Mortgage Electronic Systems, Inc. ("MERS") is a wholly owned subsidiary of MERSCORP Holdings, Inc., a Virginia corporation, which owns and operates a national electronic database called the MERS® System. That database is made available to MERS members, which include both in-state and out-of-state mortgage lenders, as well as servicers, sub-servicers, and government institutions. Joint Stip. ¶¶ 1-7, Pl. App. at 136-37.

When a residential mortgage loan is originated, a borrower typically executes both a promissory note and a mortgage granting a security interest in the real estate as collateral in the event of a default on the note. Joint Stip. ¶ 14, Pl. App. at 138. The mortgage is recorded in the local land records where the property is located. Lenders routinely sell their interests in mortgage loans on the secondary market. Such loans may be sold several times, in whole or in part, or bundled into mortgage-backed securities which are also sold and re-sold. Historically, the transfer of a loan obligation to a new owner always required an assignment of the mortgage, which was usually recorded on local land records. Rev. Complaint and Answer ¶¶ 11-13, Pl. App. at 89-90,119.

As the mortgage-backed securities market grew, and the volume of mortgage transfers increased, the recording process for assignments became cumbersome to the industry. Multiple mortgage assignments caused confusion, delay in transfers, and chain of title problems. MERS was formed to eliminate these problems, which were negatively affecting the financial industry's ability to provide home loans. Joint Stip. ¶¶ 22-24, Pl. App. at 139; Rev. Complaint and Answer ¶¶ 11-13. Pl. App. at 89-90, 119.

The sole purpose of MERS is to serve as mortgagee in the land records and the legal holder of security interests for loans registered on the MERS® System. Joint Stip. ¶ 8, Pl. App. at 137. At the origination of a loan, the borrower, lender, and MERS agree in writing that MERS will serve in a representative capacity as the agent (i.e., "nominee") of the lender and the lender's successors and assigns. The mortgage is then recorded on the local land records identifying MERS as the mortgagee acting on behalf of the lender (and the lender's successors and assigns) as its nominee/agent. Funds for the payment of fees for recording mortgages that name MERS as the mortgagee are rarely paid by MERS; they are usually collected by third parties at the time of closing, most often from the borrowers. In some instances, MERS is appointed as the lender's nominee after the note's origination when the lender assigns the mortgage to MERS. Either way, when a mortgage for which MERS is the nominee/agent is subsequently transferred among MERS members, there is no separate assignment of the mortgage because there is no change in the mortgagee; MERS remains the mortgagee of record. Joint Stip. ¶¶ 8-10, 25; Pl. App. at 137, 139.

Lenders and borrowers who choose to use the MERS® System save costs. "MERS®Works Quick Facts," Pl. App. at 51. A mortgage filed by a nominee will most likely only record once regardless of the number of subsequent assignments, whereas a mortgages filed by a traditional mortgagee will most likely be re-recorded with each subsequent assignment. The use of MERS as a nominee has become so prevalent that about 65 percent of mortgage loans nationwide and in Connecticut now originate with MERS acting as the mortgagee. Joint Stip. ¶13; Pl. App. at 137. See Hearing Testimony of William Hultman, July 11, 2013, p. 14, line 21; Pl. App. at 216. MERS has registered some 76 million mortgages across the country to date and currently tracks over 30 million active loans. Joint Stip. ¶ 11. Pl. App. at 137.

Before July 15, 2013, General Statutes § 7-34a(a) required a payment to the town clerk of $10 for the first page of each document recorded, $5 for each subsequent page, plus $2 per assignment after the first two assignments. Additional recording fees of $3 and $40 per filing were imposed by §§ 7-34a(d) and 7-34a(e) respectively. Pl. App. at 46-49.

The law at issue in this case evolved from two separate bills introduced in the 2013 legislative session: House Bill No. 6325, entitled "An Act Concerning the Assignment of Mortgage Debts," and Governor's Bill 6355, entitled "An Act Concerning Homeowner Protection Rights." House Bill 6325 would have required any assignment of a mortgage loan to be recorded on municipal land records, and would have imposed a penalty of up to $5,000 if the assignment were not presented for recording within sixty days of the transaction's completion. Def. App. at 1. Section 8 of Governor's Bill 6355 would have required each assignor of a mortgage loan to report the assignment to the Secretary of the Office of Policy and Management on a biennial basis, and to pay the State Treasurer a fee of $40 for each assignment not recorded on the municipal land records. That legislation would have imposed a civil penalty of $100 a day for each assignment that was not reported in a timely manner. Pl. App. at 192.

The purpose of those two pieces of legislation was to provide public notice of a change in the ownership of a mortgage loan, and to raise revenue for the State and its municipalities. See, e.g., Oral Testimony of Raphael L. Podolsky, Conn. Joint Standing Committee Hearings, Banks Pt. 2, 2013 Sess., p. 374, (February 19, 2013), Def. App. at 7 ("Section 8 [of Governor's Bill 6355] ... restores that level of transparency and integrity to land records....[I]t then has a collateral effect of applying the recordation fees that municipalities and states always thought were being applied.").

Ultimately, however, neither House Bill 6325 or Governor's Bill 6355 was enacted as raised, in part because of concerns articulated by a MERS representative that requiring the recordation of all assignments would place Connecticut at a disadvantage in the national market and burden the secondary mortgage market. Oral Testimony of William Hultman, Conn. Joint Standing Committee Hearings, Banks, Pt. 1, 2013 Sess., pp. 294, 303-04, February 19, 2013; Def. App. at 10,19-20. The General Assembly may also have heeded the testimony of an industry spokesperson who predicted that if House Bill 6325 were enacted, "the MERS model would effectively be outlawed in Connecticut." Written testimony of Denis R. Caron, Vice President, Commonwealth Land Title Insurance Company, Conn. Standing Committee Hearings, Planning and Development, March 11, 2013, Def. App. at 22.

Instead, the General Assembly adopted the challenged legislation (collectively, hereinafter, the "Amendments"), which raised recording fees on all persons who meet the definition of a "nominee of the mortgagee." The General Assembly also enacted legislation regarding the distribution of the recording fees to be paid by nominees: the majority of those payments are allocated to the general revenue of the state and the respective municipality where the mortgage is recorded. See 2013 Conn. Pub. Acts No. 13-184, §§ 97 and 98, Pl. App at 38-41(codified at Conn. Gen. Stat. §7-34a, Def. App at 24-26); Conn. Pub. Acts No. 13-247, §§ 81 and 82, Pl. App. at 42-45 (codified at Conn. Gen. Stat. § 49-10(h), Def. App. at 29).

General Statutes § 7-34a(a)(2)(C) defines "nominee of a mortgagee" as:

> any person who (i) serves as mortgagee in the land records for a mortgage loan registered on a national electronic database that tracks changes in mortgage servicing and beneficial ownership interests in residential mortgage loans on behalf of its members, and (ii) is a nominee or agent for the owner of the promissory note or the subsequent buyer, transferee or beneficial owner of such note.

General Statutes § 7-34a(a)(2)(A) requires that when a "nominee of a mortgagee" records a document on the land records, with two exceptions, the clerk shall collect a fee of $116 for the first page filed and $5 for each additional page. In addition, the clerk shall collect $3 pursuant to § 7-34a(d) and $40 pursuant to § 7-34a(e). Def. App. at 25-26. The two exceptions are set out in General Statutes § 7-34a(a)(2)(B), which provides that when a "nominee of a mortgagee" records "(i) an assignment of mortgage in which a nominee of a mortgagee appears as assignor, or (ii) a release of mortgage by the nominee of mortgagee," the town clerk shall collect a fee of $159, plus $10 for the first page and $5 for each additional page. The recording fees for all other persons remain unchanged pursuant to § 7-34a(a)(1). Id. at 24 . The fees collected from nominees of mortgagees are allocated as directed by Conn. Gen. Stat. § 49-10(h), Def. App. at 29.

The net effect of the amendments to General Statutes §§ 7-34a and 49-10(h) is to collect from a "nominee of a mortgagee" higher fees for the recording of deeds, assignments, and other documents than from other filers, and to deposit most of that money in the state's General Fund. MERS, the originator of the business concept of using a corporate nominee and an electronic database to track assignments of mortgage-backed securities, is currently the only entity that falls within the statutory definition of a "nominee of a mortgagee." Joint Stip. ¶ 29, Pl. App. at 139; Rev. Complaint and Answer ¶ 3, Pl. App. at 88, 118.

The legislature adopted the amendments to General Statutes § 7-34a(a) as a revenue enhancing measure to help balance the State's 2013 budget. Rev.Complaint and Answer ¶ 6, Pl. App. at 88, 118. The Office of Fiscal Analysis projected a General Fund revenue gain from the implementation of the Amendments of up to 5.4 million in both FY 14 and

FY 15 , along with an additional revenue gain for municipalities in each fiscal year. OFA Fiscal Note for HB-6706, Pl. App. at 156; OFA Fiscal Note for HB-6704, Def. App. at 34-35.

There is no indication in the record that the implementation of the Amendments has adversely affected the plaintiffs' business. From the effective date of the Amendments through the date on which the parties filed cross motions for summary judgment, there is no evidence that, because of the passage or implementation of the Amendments, (1) any MERS® System member has discontinued its membership in the MERS® System; (2) any MERS® System member has stopped its use of MERS as its nominee for mortgages or for other transactions, or (3) any MERS® System member has reduced its use of the MERS® System, or any other services of MERS. Joint Stip. ¶¶ 26-28; Pl. App. at 139.

ARGUMENT

I. THE PLAINTIFFS BEAR AN ESPECIALLY HEAVY BURDEN IN CHALLENGING THE CONSTITUTIONALITY OF THE AMENDMENTS

A. Standard Of Review

"The constitutionality of a statute presents a question of law over which [this Court's] review is plenary." State v. B.B., 300 Conn. 748, 752 (2011). Additionally, this Court has plenary review over the trial court's decision to grant summary judgment to the defendants. Cannizzaro v. Marinyak, 312 Conn. 361, 365 (2014).

B. The Unconstitutionality Of A Statute Must Be Proven Beyond A Reasonable Doubt

> [A] validly enacted statute carries with it a strong presumption of constitutionality, and those who challenge its constitutionality must sustain the heavy burden of proving its unconstitutionality beyond a reasonable doubt. The court will indulge every presumption in favor of the statute's constitutionality. Therefore, when a question of constitutionality is raised, courts must approach it with caution, examine it with care, and sustain the legislation unless its invalidity is clear.

A. Gallo and Co. v. Comm'r of Envtl. Protection, 309 Conn. 810, 822 (2013) cert. denied __ U.S. __, 134 S. Ct. 1540 (2014)(emphasis added) quoting Hong Pham v. Starkowski, 300 Conn. 412, 429-430 (2011). These principles apply regardless of whether the constitutional challenge is based on the federal or state constitution. See, e.g., Kerrigan v. Comm'r of Pub. Health, 289 Conn. 135, 155 (2008)(applying presumption of constitutionality to state constitutional challenge); Batte-Holmgren v. Comm'r of Pub. Health, 281 Conn. 277, 299 n.12 (2007)(applying presumption of constitutionality to federal constitutional challenge).

C. The Plaintiffs Have Failed To Prove Beyond A Reasonable Doubt That The Amendments Violate Their Rights To Equal Protection[1]

The trial court correctly ruled that the Amendments do not violate the plaintiffs' rights under the equal protection clause of either the U.S. Constitution or the Connecticut Constitution.[2] The court held that the distinction that the Amendments make between "a nominee of a mortgagee" and other filers is rationally related to the legitimate legislative objective of raising revenue. The plaintiffs challenge the trial court's conclusion, contending that the Amendments deny MERS equal protection by targeting MERS as a "class of one," and requiring only MERS, but not other "similarly situated" filers, to pay increased recording fees. The plaintiffs, however, have failed to demonstrate either that there is no conceivable rational basis for treating MERS, a "nominee of a mortgagee," differently than other filers, or

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1 See U.S. Const., amend. XIV and Conn. Const. art. I § 20.

2 The parties agree that the equal protection clause of the state constitution has the same scope as that of the federal constitution. Consequently, the analysis and results under either are the same. See Contractor's Supply of Waterbury, LLC v. Comm'r of Envtl. Protection, 283 Conn. 86 (2007)(with regard to economic legislation, the state constitution's equal protection clause provides no greater protection than its federal counterpart).

that MERS shares with any other filers the extraordinarily high degree of similarity that is required to state a "class of one" equal protection claim.

1. Rational Basis Review, Which Applies To An Equal Protection Challenge To Economic Legislation Such As The Amendments, Is A "Paradigm Of Judicial Restraint."

"The Equal Protection Clause...is essentially a direction that all persons similarly situated should be treated alike." Kelo v. City of New London, 268 Conn. 1, 103 (2004), aff'd, 545 U.S. 469 (2005); see also City of Cleburne, Texas v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985). For most legislation, and especially social and economic legislation, the Equal Protection Clause allows the States considerable leeway to treat similarly situated people differently. Clements v. Fashing, 457 U.S. 957, 963 (1982). "Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, [the Supreme Court's] decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest." City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976); see also Batte-Holmgren, 281 Conn. at 295. The trial court correctly determined, and the parties agree, that the Amendments at issue here neither intrude on a fundamental right nor burden a suspect class, and are therefore subject to rational basis review. MOD at 15, Pl. App. at 242.

Rational basis review "is a paradigm of judicial restraint" that is highly deferential to the legislature's choices. FCC v. Beach Communications, 508 U.S. 307, 314 (1993). A "statute is presumed constitutional . . . and the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record." Heller v. Doe, 509 U.S 312, 320-321 (1993)(internal quotation marks omitted). This means that "[a] legislative choice...may be based on rational speculation unsupported by evidence or empirical data." Id. at 320. See also Batte-Holmgren, 281 Conn. at 296 ("it is irrelevant whether the conceivable basis for the challenged distinction actually motivated the legislature"). Importantly, "rational basis review in equal protection analysis is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." Heller, 509 U.S. at 319 (internal quotation marks omitted); see also Batte-Holmgren, 281 Conn. at 296. Where there are "plausible reasons" for the legislature's action, "[the Court's] inquiry is at an end." FCC v. Beach Communications, 508 U.S. 307, 313-314 (1993).

2. The Amendments Satisfy Rational Basis Review Because They Serve The Legitimate Legislative Objective Of Raising Revenue For The State

There is no dispute between the parties that "the increased recording fees set forth in General Statutes § 7-34a(a)(2) were enacted as a revenue-enhancing measure to help balance the State's 2013 budget." Rev. Complaint and Answer, ¶6, Pl. App. at 88, 118. The trial court also noted that "the Office of Fiscal Analysis report for House Bill 6706 explicitly provides for the 'revenue gain' for Fiscal Year 2014 and Fiscal Year 2015." MOD at 16, Pl. App. at 243. See also OFA Report for HB 6704, Def. App. at 35. The trial court, recognizing that the plaintiffs bear the burden of proving the unconstitutionality of the Amendments, held that "[t]hey have offered no persuasive argument as to why raising revenue would not furnish a conceivable basis or a 'plausible policy reason' for legislation imposing heightened fees." MOD at 17, Pl. App. at 244. Raising revenue for general governmental purposes is widely recognized as a valid legislative goal. E.g., Harbor Ins. Co. v. Groppo, 208 Conn. 505, 511 (1988); Mountain Fuel Supply Co. v. Salt Lake City Corp., 752 P.2d 884, 890

(Utah 1988); Horizon Blue Cross Blue Shield of New Jersey v. State, 425 N.J. Super. 1, 23, 39, cert. denied, 211 N.J. 608 (2012). The trial court, therefore, correctly concluded that "raising revenue is a legitimate governmental purpose as to the statutes in question." MOD at 17, Pl. App. at 244.

3. Raising Recording Fees Paid By Nominees Of Mortgagees Is Rationally Related To The Legislative Goal Of Raising Revenue

Cost savings is one of the benefits enjoyed by lenders and borrowers who choose to use the MERS® System. See "MERS®Works Quick Facts, pl. App. at 51("MERS as original mortgagee eliminates breaks in the chain of title, resulting in less work and lower fees paid by the lender - fees that would ultimately be passed down to the homeowner.").[3] The General Assembly reasonably could have decided to raise general revenue by tapping into

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[3] See also, MERSCORP, Inc. v. Romaine, 8 N.Y.3d 90,104 (2006)(Kaye, C.J., dissenting)("Through use of MERS as nominee, lenders are relieved of the costs of recording each mortgage assignment with the County Clerk, instead paying minimal yearly membership fees to MERS."); Bank of New York v. Silverberg, 926 N.Y.S.2d 532, 536 (App. Div. 2011)(stating that the use of the MERS® System "free[s] MERS's members from paying the recording fees that would otherwise be furnished to the relevant localities.")

"The MERS® System has... eliminat[ed] the need to prepare and record separate assignments of the mortgage lien. By doing so, the MERS® System has saved consumers, investors, and the mortgage industry millions of dollars each year in recording fees..." P. Sargent & M. Harris, "The Myths and Merits of MERS," The National Law Review, p. 12, Brief of Amicus Curiae App. at 12.

Because MERS remains the mortgagee of record in the public land records throughout the life of a loan, it eliminates the need to record later assignments in the public land records. Estimates are that MERS will save the mortgage industry $200 million a year by eliminating the need for many assignments.

R.K. Arnold, "Yes, There Is Life on MERS," 11 Probate & Prop. 33 (1997), Amicus Curiae App. at 29.

some of the savings that ultimately accrue to lenders and homeowners through use of the MERS® System or any similar business model. As the trial court recognized, "[T]he state may not have been seeking to raise revenue generally, but raise revenue as it relates specifically to the loss of future revenue that would have otherwise been generated from recordation of subsequent assignments and transfers between the members of MERS had those members been non-members." MOD at 22, Pl. App. at 249. The General Assembly may also have wanted to create greater parity between those homeowners whose mortgage financing costs may be lowered by their lenders' use of MERS as a nominee, and those residential mortgagors who may pay higher fees because their lenders do not utilize a nominee. See MOD at 23, Pl. App. at 250. Cf. Mountain Fuel Supply, 752 P.2d at 890 (concluding that a city ordinance imposing an annual licensing tax on all natural gas, electricity and telephone suppliers was rationally related to the legitimate governmental objective of raising revenue, because "[b]y imposing the licensing tax indirectly on all users of telephone, electric, and gas service, the City is able to reach those not otherwise subject to other City taxes [such as religious, governmental and charitable organizations] and thereby spread more broadly the financial burden of providing City services.").

A legislature may, without running afoul of the federal or state equal protection clauses, raise revenue by imposing taxes or fees on a particular business model that, by its nature, bears a lesser regulatory or fiscal burden than others. For example, in Direct TV v. Commonwealth, 2012 WL 6062737 (Mass. Super. Ct. Nov. 26, 2012), Def. App at 36, satellite TV companies challenged legislation that imposed a five per cent excise tax on satellite TV providers, but not cable TV providers. The plaintiffs argued that there was no rational basis for distinguishing between satellite TV and cable TV, and that the real purpose of the legislation was a parochial and illegally discriminatory one: to reward cable TV providers for their local economic activities and to penalize satellite TV providers for failing to invest and operate in Massachusetts. The superior court in that case rejected those assertions, explaining:

> The enactment of the satellite tax came at a time when Massachusetts was in the throes of a fiscal crisis. The Legislature was faced with a looming revenue shortfall, and it chose, as a small part of the solution, to tax a sector whose existing regulatory and fiscal obligations to the sovereign were reasonably perceived as modest when compared to those of the rest of the pay-TV industry. This was a plausible and entirely legitimate reason for the tax classification.
> ....
> In short: the plaintiffs have not shown that the satellite tax had any purpose beyond the obvious: raising revenue, by taxing an industry sector that was rationally viewed as undertaxed.

Id. at 13. Accord, Harbor Insurance Co., 208 Conn. at 511 (statute that taxed an out-of-state insurer on previous business that the insurer had written on Connecticut property or risks, once the insurer chose to become licensed in the state, was "rationally related to its legitimate purpose of raising revenue"); Horizon Blue Cross Blue Shield, 425 N.J. Super. at 24 (newly-enacted tax legislation "was rationally related to the legislative goals of raising revenue to reduce a budget deficit as well as to eliminate a loophole in the tax law whereby [qualified health service corporations] had a lower effective tax rate than other health insurance carriers.") As the foregoing judicial analyses demonstrate, the trial court in this case reached the constitutionally correct conclusion: namely, that "raising fees as to an entity that is subject to recording fees less often than other mortgagees is reasonable" and rationally related to the legitimate legislative objective of raising revenue. MOD at 21, Pl. App. at 248.

4. The Plaintiffs' Claim That The General Assembly Targeted MERS Has No Factual Basis

The plaintiffs' contend that the General Assembly's real motivation in passing the Amendments was not to raise revenue, but to punish them. That argument should be rejected because there is no foundation for it in the factual record. If a legislature rationally decides that a particular method promotes a permissible objective, a court must uphold the challenged legislation. See Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 461-70 (1981) (court must assume articulated purpose of legislation is actual purpose unless circumstances force conclusion that stated purpose could not have been goal).

Moreover, the plaintiffs' reliance on City Recycling, Inc. v. State, 257 Conn. 429 (2001) is misplaced. In that case, this Court, on the basis of the lower court's extensive and probing evidentiary record, concluded that "[t]he specific factual findings made by the trial court directly negate every conceivable rational basis for the legislation." Id. at 453. No comparably inculpatory evidentiary record exists here.

In City Recycling, this Court also found the convoluted legislative saga of the statute at issue to be fatal to its constitutionality. In contrast, the legislative history of the law at issue here reveals no maneuvering by the General Assembly as a result of animus toward the plaintiffs or their business model. Legislative records show that the passage of the Amendments actually preserved the plaintiffs' ability to conduct business in Connecticut. The Amendments were adopted in lieu of two other legislative proposals, introduced during the same session as the Amendments, that would have required any assignment of mortgage debt to be (1) recorded on the land records, or (2) reported to the Secretary of the Office of Policy and Management, accompanied by the payment of a forty-dollar fee. Each of those proposals would have heavily penalized lack of prompt compliance. See House Bill

No. 6325, Def. App at 1, and Governor's Bill 6355, § 8, Pl. App. at 182,192. During public hearing on those bills, one mortgage industry spokesperson asserted that, "If [H.B. 6325] were to become law, the MERS model would effectively be outlawed in Connecticut." Written testimony of Denis R. Caron, Vice President, Commonwealth Land Title Insurance Company, Conn. Joint Standing Committee Hearings, Planning and Development, March 11, 2013. Def. App. at 22. Mr. Caron further advised, "The better fiscal solution is to increase recording fees ...in a more efficient manner that does not result in additional work for town registrars or require a new process of reporting or collecting a new fee. Examples could include ...increasing the fee to record the mortgage." Id. It is certainly conceivable that the General Assembly recognized the practicality of that suggestion and enacted the Amendments instead of House Bill 6325 or Section 8 of Governor's Bill 6355, either of which would have been far more burdensome to MERS. Compare City Recycling, 257 Conn. at 449 ("[T]he legislative history clearly demonstrates that the sole purpose of [the challenged legislation] was to prevent the plaintiff from building its proposed volume reduction facility.") Here, the General Assembly chose a means of raising revenue that has neither foreclosed MERS' operation in Connecticut, nor harmed its business overall. See Joint Stip. ¶¶ 26-28, Pl. App. at 139.

The legislative and factual records also controvert the plaintiffs' accusation that lawmakers subjected only MERS to higher fees in order to avoid political recrimination that they might otherwise have encountered had the higher fees been imposed more broadly. MERS, however, does not occupy an isolated niche in the mortgage industry; it acts as mortgagee on approximately 65% of all mortgages recorded nationwide and in Connecticut.

Joint Stip. ¶13, Pl. App. at 137. Approximately 76 million mortgages have been registered to date with the MERS® System. Joint Stip. ¶11, Pl. App. at 137.

More importantly, recording fees for mortgages on which MERS is named as mortgagee are rarely paid by MERS; they are generally collected from borrowers at closing. Joint Stip. ¶ 25, Pl. App. at 139. Legislative debate regarding the Amendments reveals that lawmakers were acutely aware that the real source of future revenue raised by the legislation would not be MERS' profits, but their own constituents' pockets. Senator McKinney exhorted his colleagues:

> [W]e can get up and say there's no new taxes, but when someone files their mortgage on MERS -- so we're talking about 60 percent of mortgage holders -- they're going to now pay $159 instead of 53. Imagine somebody, a young couple,...buying their first home, struggling to get that financing,...and now getting socked with another $106 increase in the cost of buying the American dream.

S. Proc., 2013 Sess. p. 170, (June 3, 2013) Pl. App. at 164.

Senator Linares concurred, stating:

> I think that families that are looking to buy a home in states around the area or states bordering Connecticut will definitely take into consideration the tax code, the fee structures....[W]e talk so much about keeping people in Connecticut, giving them a reason to stay here...Then I ask, why are we imposing this new $106 fee, which I believe to be essentially a money grab on people who are looking to live in Connecticut.

Id. at 165, Pl. App. at 160-61.

The foregoing passages of legislative debate disprove the plaintiff's contention that the General Assembly intended to obstruct or punish MERS, and also reveal legislators' clear understanding that the burden of the proposed fee increase would be borne, not by MERS, but by individual Connecticut homebuyers, the majority of whom take out mortgages naming MERS as mortgagee.

5. The Plaintiffs Have No Equal Protection Claim, Because There Are No Others Bearing An "Extremely High Degree Of Similarity" Who Are Being Treated Differently.

The threshold requirement for claiming an equal protection violation is identifying "specific instances in which persons situated similarly in all relevant respects were treated differently." Brooks v. Sweeney, 299 Conn. 196, 219 (2010)(emphasis in original)(internal citation omitted). "[T]he analytical predicate of an equal protection claim is a determination of who are the persons purporting to be similarly situated... [T]his initial inquiry is not whether persons are similarly situated for all purposes, but whether they are similarly situated for purposes of the law challenged." State v. Dyous, 307 Conn. 299, 315 (2012)(citations and internal quotation marks omitted)(emphasis added). "It is only after this threshold requirement is met that the court will consider whether the statute survives scrutiny under the equal protection clause." Keane v. Fischetti, 300 Conn. 395, 403 (2011); see also Batte-Holmgren v. Comm'r of Pub. Health, 281 Conn. at 295; City Recycling, 257 Conn. at 449. This Court's analysis of the plaintiffs' challenge to the Amendments should not even advance beyond a threshold inquiry, because a "nominee of a mortgagee" is not "similarly situated" with other recorders for purposes of the Amendments.

The plaintiffs assert that they satisfy the "similarly situated" requirement by virtue of the fact that MERS is a "class of one" that has been singled out for adverse treatment.

> Equal protection [however] is not violated where a legislative classification consists of a single member. When courts consider an equal protection claim, the single-entity question boils down to whether the court can perceive any rational basis for the legislative classification whose impact, whether positive or negative, falls on a single person or entity.

Horizon Blue Cross Blue Shield of New Jersey v. New Jersey, 25 N.J. Tax 290, 308 (2009), aff'd, Horizon Blue Cross Blue Shield of New Jersey v. New Jersey, 425 N.J. Super. 1 (Super. Ct. App. Div.) cert. denied 211 N.J. 608, 50 A.3d 41 (2012) (internal citations omitted). See also Village of Willowbrook v. Olech, 528 U.S. 652, 564 (2000).

"Class of one plaintiffs . . . 'must show an extremely high degree of similarity between themselves and the persons to whom they compare themselves.'" Brooks, 299 Conn. at 219, quoting Clubside, Inc. v. Valentin, 468 F.3d 144, 159 (2d Cir. 2006). They must demonstrate that they are being treated differently than someone who is "prima facie identical in all relevant respects." Neilson v. D'Angelis, 409 F.3d 100, 104 (2d. Cir. 2005), overruled on other grounds, Appel v. Spiridon, 531 F.3d 138 (2d Cir. 2008). Accordingly, "class of one" plaintiffs must establish that

> (i) no rational person could regard the circumstance of the plaintiff to differ from those of a comparator to a degree that would justify the differential treatment on the basis of a legitimate government policy; and (ii) the similarity in circumstances and difference in treatment are sufficient to exclude the possibility that the defendants acted on the basis of a mistake.

Ruston v. Town Bd. for Town of Skaneateles, 610 F.3d 55, 60 (2d Cir.), cert. denied, 131 S. Ct. 824 (2010). See also Fortress Bible Church v. Feiner, 694 F.3d 208, 222-23 (2d Cir. 2012)("[T]he issues being compared [must be] so similar that differential treatment with regard to them cannot be explained by anything other than discrimination."). Accord, Pappas v. Town of Enfield, 18 F. Supp. 3d 164, 179 (D. Conn. 2014).

As detailed above, the undisputed purpose of the Amendments was to raise general revenue. See Rev. Complaint, ¶¶ 5,6, Pl. App. at 88; MOD at 19, Pl. App. at 246. The trial court recognized that the General Assembly rationally must have decided to raise revenue, not from all filers, but from those who had devised a way to save money by reducing recording expenses. MOD at 20-22, Pl. App. at 247-49. The court correctly found "unpersuasive" the plaintiffs' argument "that because § 7-34a(a)(2) expressly states that the purpose of the statute is to compensate town clerks for their service in recording documents, this is the only context in which the court should determine whether the classification is justified and no other purpose should be considered."[4] Here, the proper comparators "for purposes of the law challenged" are not all other filers, but only those who save money by utilizing a specific legal strategy that renders certain recording functions unnecessary. It is only those persons who are "similarly situated" to MERS for purposes of the Amendments. Simply because MERS is presently the only entity that employs an innovative approach does not make regulation of MERS' business model irrational or unconstitutional; it merely illustrates how MERS is dissimilar from all other filers. If, hereafter, other filers emulate MERS' method of obviating the recording process for certain documents, those persons will be "similarly situated" to MERS, and the law will apply equally to them.

When the threshold requirement of identifying similarly situated entities is not met, the equal protection clause is not implicated at all, and no scrutiny of the governmental action is required. Ruston, 610 F.3d at 59-60. See also Stuart v. Commissioner of Correction, 266 Conn. 596 (2003); Alexander v. Commissioner of Administrative Services, 86 Conn. App. 677, 685-86 (2004); Mercer v. Champion, 139 Conn. App. 216, 235-38 (2012).

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4 The plaintiffs attempt to define "the purposes of the law challenged," Dyous, 307 Conn. at 315, by directing this Court to a statement made by Senator Alfano on the floor of the Senate in 1963, regarding the bill that became the original version of Conn. Gen. Stat. §7-34a(a)(1). Plaintiffs' Brief at 10, App. at 169-170. Showing the intent of the General Assembly in 1963, however, is of no help in ascertaining the intent of the 2013 General Assembly in enacting the Amendments. Cf. Horizon Blue Cross Blue Shield, 425 N.J. Super at 14 ("Horizon cites no case, and indeed no case has been found by this court, which holds that an amendment to a statute must be consistent with the original intent of the statute it amends in order for there to be a legitimate state purpose which supports the amendment.")

Because the plaintiffs have failed to meet their threshold burden, this Court should reject their equal protection challenge without further analysis.

D. The Plaintiffs Have Failed To Prove Beyond A Reasonable Doubt That The Amendments Violate Their Rights To Substantive Due Process[5]

The plaintiffs' federal and state substantive due process claims fail because raising recording fees is rationally related to Connecticut's legitimate state interest in raising revenue. Where a statute neither interferes with a fundamental right nor singles out a suspect classification, the law should be subjected, for substantive due process analysis, to rational basis review. It must be upheld unless a plaintiff can demonstrate that there is no rational relationship between the legislation and a legitimate legislative purpose. Blakeslee Arpaia Chapman, Inc. v. El Constructors, 239 Conn. 708, 756-59 (1997); Dutkiewicz v. Dutkiewicz, 289 Conn. 362, 381 - 82 (2008); Molinari v. Bloomberg, 564 F.3d 587, 606 (2d Cir. 2009.) With respect to substantive due process claims, rational basis review is "for all material purposes . . . indistinguishable" from that applied in equal protection cases. Ramos v. Town of Vernon, 254 Conn. 799, 841 (2000); See also Rotunda and Nowak, Treatise on Constitutional Law, § 14.6 n.110 (4th ed. 2007).[6] Thus, the plaintiffs' substantive due pro-

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[5] See U.S. Const. amend XIV and Conn. Const. art. I, §§ 8, 10.

[6] Although this Court has acknowledged that the substantive due process provisions of the state constitution could provide greater protection than the federal constitution, it has never held that such greater protection applies. See e.g., Ramos, 254 Conn. at 837 ("there is no support for the proposition that, in the circumstances relevant to this case, our state constitution affords any greater substantive due process rights than the federal constitution"); Blakeslee Arpaia Chapman, 239 Conn. at 759 (applying rational basis to substantive due process claim under state constitution). The plaintiffs do not assert that any greater protection under the state constitution than under the federal constitution should apply in this case.

cess claims must fail for the same reasons that their equal protection claims fail; there are conceivable rational bases for treating a "nominee of a mortgagee" differently than other recorders.

E. The Plaintiffs Have Failed To Prove Beyond A Reasonable Doubt That The Amendments Violate The Federal Commerce Clause [7]

A state statute violates "the dormant Commerce Clause only if it (1) clearly discriminates against interstate commerce in favor of intrastate commerce, (2) imposes a burden on interstate commerce incommensurate with the local benefits secured, or (3) has the practical effect of extraterritorial control of commerce occurring entirely outside the boundaries of the state in question." Selevan v. New York Thruway Auth., 584 F.3d 82, 90 (2d Cir. 2009 (quotations omitted). "The party challenging a law...bears the threshold burden of demonstrating that it has a disparate impact on interstate commerce - the fact that it may otherwise affect commerce is not sufficient." Town of Southold v. Town of East Hampton, 477 F.3d 38, 47 (2d Cir. 2007)(internal citation omitted). See also Heffner v. Murphy, 745 F.3d 56, 73 (3d Cir. 2014)(stating that a regulation that burdens commerce without discriminating against interstate commerce does not violate the Commerce Clause).

The dormant Commerce Clause, in contrast to the Equal Protection Clause, focuses on protecting markets, rather than persons, from discrimination. "The common thread among those cases in which the [United States Supreme] Court has found a dormant Commerce Clause violation is that the State interfered with the natural functioning of the interstate market either through prohibition or through burdensome regulation." McBurney v. Young, __ U.S. __, 133 S. Ct. 1709 (2013)(internal citation omitted). "The fundamental

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[7] See U.S. Const. art. I, § 8.

objective of the dormant Commerce Clause is to 'preserv[e] a national market for competition undisturbed by preferential advantages conferred by a State upon its residents or resident competitors.'" Brown & Williamson Tobacco Corp. v. Pataki, 320 F.3d 200, 208 (2d Cir. 2003) quoting General Motors Corp. v. Tracy, 519 U.S. 278, 299 (1997). See also Quik Payday, Inc. v. Stork, 549 F.3d 1302, 1309 (10th Cir. 2008), cert. denied, 556 U.S. 1209 (2009), quoting Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 127-28 (1978)("The Commerce Clause protects the interstate market, not particular interstate firms..."); General Motors, 519 U.S. at 300 ("The dormant Commerce Clause protects markets and participants in markets, not taxpayers as such.").

1. The Amendments Do Not "Clearly Discriminate" Against Interstate Commerce In Favor Of Intrastate Commerce

"The term discrimination in this context 'means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.'" Town of Southold, 477 F.3d at 47, quoting Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality, 511 U.S. 93, 99 (1994). The Amendments do not favor local businesses over interstate businesses, or in-state consumers over out-of-state consumers. When a mortgage is recorded on a piece of Connecticut real estate, the recording fee paid pursuant to the Amendments is the same regardless of whether the recording bank is a local bank or a national bank, or whether the purchaser of the property is a Connecticut resident or non-resident. Moreover, the recording fee does not change depending on whether the actual mortgage transaction occurs in Connecticut or outside of Connecticut. Rather, the Amendments require a higher recording fee to be paid whenever the mortgage is recorded by a person who is a nominee of the owner of the promissory note, and that person "serves as mortgagee in the land records for a mortgage loan registered on a national electronic database that tracks changes in mortgage servicing and beneficial ownership interests in residential mortgage loans on behalf of its members...." Conn. Gen. Stat. § 7-34a(a)(2)(C)(i). Def. App. at 25. Because that definition does not differentiate on the basis of the location or residency of either the lender or the borrower, or the locus of the transaction, it does not favor intrastate commerce over interstate commerce. See Clover Leaf Creamery Co., 449 U.S. at 471-72.

Moreover, including the term "national electronic database" in the definition of "nominee of a mortgagee" does not, as the plaintiffs contend, render the Amendments discriminatory, because maintaining a national database is not, in itself, a transaction in interstate commerce. Operating a database simply is not interstate trade to which the Commerce Clause applies.[8] A database is just a collection of information; it is neither a "transaction," which occurs either within a state or across state lines, nor "an article of commerce," which travels either within a state or across state lines.

The plaintiffs' allegation of discrimination should be rejected for two additional reasons: the plaintiffs have not (1) delineated the market in which they are competing, or (2) identified any competitor, within that market, who is receiving more favorable treatment than they.

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8 The plaintiffs, on page 24 of their brief, cite to the following applicable tenets of governing law: "[A] law is discriminatory if it taxes a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State," Oregon Waste Sys., 511 U.S. at 99(emphasis added); "[A] state may not discriminate between transactions on the basis of some interstate element." Fulton Corp. v. Faulkner, 516 U.S. 325, 331(1996) citing Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318, 332, n.12 (1977)(emphasis added).

See also C&A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 390 (1994) (The Commerce Clause may invalidate "local laws that impose commercial barriers or discriminate against an article of commerce by reason of its origin or destination out of State.")(emphasis added).

> Under the dormant Commerce Clause analysis, "any notion of discrimination assumes a comparison of substantially similar entities." Indeed, "in the absence of actual or prospective competition between the supposed favored and disfavored entities in a single market there can be no local preference, whether by express discrimination against interstate commerce or undue burden upon it, to which the dormant Commerce Clause may apply."

Alliance of Auto. Mfrs, Inc. v. Curry, 984 F. Supp. 2d 32, 57(D. Conn. 2013) quoting General Motors, 519 U.S. at 298, 300. The plaintiffs have failed to sustain their burden of showing what market is being detrimentally affected by the operation of the Amendments. "[L]aws that draw distinctions between entities that are not competitors do not 'discriminate' for purposes of the dormant Commerce Clause...." Town of Southold, 477 F.3d at 49. The plaintiffs have stipulated that they are not aware that their business operations have suffered as a result of the legislation's implementation. See Joint Stip. ¶¶ 26-28, Pl. App. at 139. That stipulation proves that no discrimination against plaintiffs' participation in an interstate market is occurring. "[E]quality for the purposes of competition and the flow of commerce is measured in dollars and cents, not legal abstractions." Halliburton Oil Well Cementing Co. v. Reily, 373 U.S. 64, 70 (1963).

Moreover, the plaintiffs cannot identify a single market competitor who has obtained a market advantage over MERS from the implementation of the Amendments. That evidentiary deficiency dooms their Commerce Clause claim, because courts "have never deemed a hypothetical possibility of favoritism to constitute discrimination that transgresses constitutional commands." Associated Indus. of Missouri v. Lohman, 511 U.S. 641, 654 (1994). "[T]he mere fact that a statutory regime has a discriminatory potential is not enough to trigger strict scrutiny under the dormant commerce clause." Cherry Hill Vineyard, LLC v. Baldacci, 505 F.3d 28, 37(1st Cir. 2007)(emphasis in original).

Indeed, the scenario of potential discrimination that the plaintiffs suggest is not only conjectural at the present time, but probably unfeasible as well. The plaintiffs make the following conclusory assertions: "If MERSCORP operated only a Connecticut database, MERS would not qualify as a 'nominee' under § 7-34a." Plaintiffs' Brief at 24. "[A]n identical transaction would not be subject to a higher recording fee if MERSCORP maintained a solely intra-state database as opposed to a national database." Id. at 25 (emphasis in original). "If MERSCORP operated a database that tracked only Connecticut mortgages, the triple fee on MERS would not apply." Id. at 26-27. The plaintiffs do not explain how tracking changes in mortgage servicing and beneficial ownership interests, even for Connecticut mortgages only, could possibly be accomplished by maintaining a solely intrastate electronic database. The inherently national scope of the secondary mortgage market dictates that a business serving as a "nominee of a mortgagee," even a business tracking only Connecticut mortgages, would need to utilize a "national" electronic database. That inference seems self-evident, because all notes, including those secured by Connecticut mortgages, may be traded freely between state banks and national banks located anywhere in the country. See Rev. Complaint and Answer ¶¶ 11-13, Pl. App. at 89-90, 119.[9] Consequently,

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9 "[T]oday, interstate lending and assignment of mortgage loans into a national secondary mortgage market have become the norm." Joyce Palomar, The War Between Attorneys and Lay Conveyancers--Empirical Evidence Says "Cease Fire!", 31 Conn. L. Rev. 423, 441(1999).

> The secondary mortgage market is a securities-like market in which mortgages originated by local mortgage lenders are bundled into large packages,... insured by the federal government and then sold on a national market to private investors located all over the country and, increasingly, the world....

Footnote continued on next page.

any competitor of MERS would presumably be required to pay the higher recording fee. Cf. Exxon Corp., 437 U.S. at 125 (because Maryland's entire gasoline supply flowed in interstate commerce and there were no local producers or refiners, claims of disparate treatment between interstate and local commerce were meritless).

Because the plaintiffs have identified neither an interstate market adversely affected by the Amendments' provisions, nor the existence of a competitor benefitting from those provisions, the trial court properly rejected the plaintiffs' claim of discrimination under the dormant Commerce Clause. See Alliance of Automobile Mfrs. v. Gwadosky, 430 F.3d 30, 41 (1st Cir. 2055)(affirming summary judgment for the defendant where the plaintiff, in support of a dormant Commerce Clause claim, "offered only prognostications woven from the gossamer strands of speculation and surmise, unaccompanied by any significantly probative evidence" of a discriminatory effect on interstate commerce.)

2. The Amendments Do Not Impose A Burden On Interstate Commerce That Is Clearly Excessive In Comparison To Local Benefits

A law that has a disparate impact on interstate commerce, but is not discriminatory, is analyzed under the balancing test set forth in Pike v. Bruce Church, 397 U.S. 137, 142 (1970). Under the Pike test, "non-discriminatory regulations that have only incidental effects on interstate commerce are valid unless 'the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.'" Oregon Waste Systems, 511 U.S. at 99, quoting Pike, 397 U.S. at 142. "[T]he extent of the burden that will be tolerated will . . . depend on the nature of the local interest involved, and on whether it could be pro-

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Michael Braunstein, Structural Change And Inter-Professional Competitive Advantage: An Example Drawn from Residential Real Estate Conveyancing, 62 Mo. L. Rev. 241, 249-50 (1997) quoted in id. at 441, n. 66.

moted as well with a lesser impact on interstate activities." Pike, 397 U.S. at 142. In applying the Pike balancing test, it is important to remember that "the benefit-to-burden calculation is based on the overall benefits and burdens that the statutory provision may create, not on the benefits and burdens with respect to a particular company or transaction." Quik Payday, 549 F.3d at 1309 (emphasis added).

As the trial court explained,

> "for a state statute to run afoul of the Pike standard, the statute, at a minimum, must impose a burden on interstate commerce that is qualitatively or quantitatively different from that imposed on intrastate commerce...To this point, we have recognized three instances in which a non-discriminatory state or local regulation may impose a differential burden on interstate commerce: (1) when the regulation has a disparate impact on any non-local commercial entity; (2) when the statute regulates commercial activity that takes place wholly beyond the state's borders; and (3) when the challenged statute imposes a regulatory requirement inconsistent with those of other states."

MOD at 31, Pl. App. at 258, quoting United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt Auth., 438 F.3d 150, 156-57 (2d Cir. 2006)(internal quotation marks omitted), aff'd, 550 U.S. 330 (2007). None of those criteria is met in this case.[10]

The only factual allegations of disparate impact that the plaintiffs have put forth are that the Amendments have increased their costs of doing business, as well as consumers' costs of doing business with them. Plaintiffs' Brief at 27-28. Those circumstances, however, even if true, are not constitutionally cognizable. With respect to the plaintiffs' increased cost of doing business, even "the fact that a law may have devastating economic consequences on a particular interstate firm is not sufficient to rise to a Commerce Clause bur-

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10 The plaintiffs have not contended that the Amendments impose a regulatory requirement that is inconsistent with those of other states; consequently, the third element of the Pike test was not addressed by the trial court, and is not addressed here.

den." Pharm. Research & Mfrs of America v. Concannon, 249 F.3d 66, 84 (1st Cir. 2001), aff'd sub nom. Pharm. Research and Mfrs of America v. Walsh, 538 U.S. 644 (2003)(internal citations and quotation marks omitted). In this case, the plaintiffs' business has not been adversely impacted by the Amendments. The plaintiffs stipulated that there was no evidence that the passage and implementation of the Amendments had caused any MERS® System member to discontinue its membership in the MERS® System; any MERS® System member to stop using MERS as its nominee for mortgages or for other transactions; or any MERS® System member to reduce its use of the MERS® System or any other services of MERS. Joint Stip. ¶¶ 26-28, Pl. App. at 139.

With respect to customers' increased cost of doing business with the plaintiffs,[11] the Commerce Clause does not pertain to the intrastate effects of governmental activity and does not protect citizens of a state from the consequences of the decisions of their own lawmakers. Nat'l Elec. Mfrs Ass'n v. Sorrell, 272 F.3d 104, 112, (2d Cir. 2001) citing Nat'l Paint & Coatings Ass'n v. City of Chicago, 45 F.3d 1124, 1132 (7th Cir. 1995). "It may be true that the consuming public will be injured by the effect of the challenged regulation, but...that argument relates to the wisdom of the statute, not to its burden on commerce." Sorrell, 272 F.3d at 112, quoting Exxon Corp., 437 U.S. at 128 (internal quotation marks omitted).

The plaintiffs also contend that the Amendments have impermissible extraterritorial effects. They cite, as dispositive of the Amendments' invalidity, two cases involving statutes

[11] The plaintiffs stipulated that "[f]unds for the payment of fees for recording mortgages, which name MERS as the mortgagee, are usually collected by third parties as a closing, most often from homebuyers." Joint Stip. ¶25. Pl. App. at 139. The trial court, on the basis of that stipulation, accurately found that "it is ultimately the Connecticut residents who are paying the higher fee." MOD at 32, Pl. App. at 259.

that were found to disadvantage in-state businesses that engaged in interstate transactions. In Camps Newfound/Owatonna v. Town of Harrison, 520 U.S. 564 (1997), the United State Supreme Court struck down a Maine statute that gave a tax exemption to summer camps whose clientele were primarily Maine residents, but denied the exemption to summer camps that enrolled mostly nonresident campers. In Healy v. Beer Institute, 491 U.S. 324 (1989), the Court invalidated a Connecticut statute that economically penalized Connecticut brewers who conducted business in border states. As the trial court correctly concluded, each of those cases is distinguishable because the respective statute at issue, unlike the Amendments, contained express language that differentiated between residents and non-residents, or in-state and out-of-state sales. MOD at 29-30, Pl. App. at 256-57. "The Second Circuit has repeatedly rejected ... extraterritoriality challenges to state regulations containing no reference to other states." Curry, 984 F.Supp.2d at 59, citing Freedom Holdings v. Spitzer, 357 F.3d 205, 217-18 (2d Cir. 2004); Sorrell, 272 F.3d at 110. Because the Amendments do not facially discriminate against interstate commerce, they cannot exert improper extraterritorial reach.

Finally, the "putative local benefits" anticipated from the Amendments greatly outweigh any burden the Amendments might impose on interstate commerce. The Office of Fiscal Analysis projected that the increased recording fees generated by the Amendments would result "in a General Fund revenue gain estimated to be up to 5.4 million in both FY14 and FY 15. Municipalities also realize a revenue gain...the extent of which is not known at this time." OFA Fiscal Note for HB-6706, Pl. App. at 156.

In sum, the Court need not conduct a Pike balancing analysis, because "[u]nder the Pike test, if no ... unequal burden [on interstate commerce] be shown, a reviewing court need not proceed further." Freedom Holdings, 357 F.3d at 217-18. The plaintiffs have not proven that the Amendments impose any burden on interstate commerce; therefore, no Pike inquiry is required. Even if the Court were to apply the Pike test, however, the factual record shows that the Amendments have no disparate impact or extraterritorial effect, and any burden on interstate commerce is minimal compared to the local benefit that the Amendments provide in the form of increased revenue for the state and its municipalities.

3. The Amendments Do Not Impose An Impermissible User Fee

The plaintiffs also argue that the Amendments violate the Commerce Clause by requiring "a nominee of a mortgagee" to pay a fee that does not fairly approximate the cost of MERS' utilization of municipal resources. That argument is flawed, because the payments that the Amendments require are more akin to a tax than a user fee.[12] Nevertheless, even

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[12] A tax, to be valid, requires no correlation between the amount of an assessment and any services provided. Nat'l R.R. Passenger Corp. v. City of New York, 695 F. Supp. 1570, 1575 (S.D.N.Y. 1988), aff'd, 882 F.2d 710 (2d Cir. 1989) ("A tax need not have any relation to governmental costs.... A user fee, on the other hand, must be no greater than the government's costs.") As discussed previously, the Amendments were enacted primarily to raise general revenue for the state and its municipalities, not to compensate clerks for recording documents. Courts have uniformly held that "[i]f the primary purpose of the fee is to raise general revenue, it is a tax." Holmdel Builders Ass'n v. Township of Holmdel, 121 N.J. 550, 582 (1990). It is "[t]he operation of the exaction, rather than the specific language used to describe it, [that] ultimately demonstrates its nature." Easthampton Sav. Bank v. City of Springfield, 470 Mass. 284 (2014). See Lublin v. Brown, 168 Conn. 212, 223-24 (1975)(the statutory "license fees" imposed on members of various occupations and professions are payable to the governmental department or board charged with regulating the members of the particular profession or occupation, but the "occupational tax" assessed against attorneys is collected by the state tax commissioner and deposited into the state's general fund.)

Importantly, deeming the required payments at issue here to be a tax does not render them unlawful. The plaintiffs have not claimed to be exempt from paying taxes, and "[i]n Connecticut, the power to levy taxes is vested in the General Assembly." Lublin, 168 Conn at 220.

if this Court were to conclude that the Amendments establish a user fee, the plaintiffs have failed to show, beyond a reasonable doubt, how such a fee violates the Commerce Clause. The United State Supreme Court has articulated the applicable constitutional test as follows:

> [W]hile state or local tolls must reflect a uniform, fair and practical standard relating to public expenditures, it is the amount of the tax, not its formula, that is of central concern. At least so long as the toll is based on some fair approximation of use or privilege for use,...and is neither discriminatory against interstate commerce nor excessive in comparison with the governmental benefit conferred, it will pass constitutional muster....

Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc., 405 U.S. 707, 716-17(1972).

As previously discussed, the Amendments do not discriminate against interstate commerce, Furthermore, the amount of the base fee imposed on a "nominee of a mortgagee" is $159, which is not excessive in comparison to either the value of the residential real estate transaction being recorded, or the value of having access to a municipal land registry that tracks real estate transactions and associated security interests. Finally, the plaintiffs have presented no evidence regarding the governmental costs associated with maintaining a registry of land records, and hence, cannot support their conclusory allegation that the fees imposed by the Amendments are not a fair approximation of the governmental benefit conferred.

F. The Plaintiffs Have Failed To Prove Beyond A Reasonable Doubt That The Amendments Are Constitutionally Prohibited Bills Of Attainder[13]

"To constitute a bill of attainder, a statute must: (1) apply with specificity to affected persons; (2) impose punishment; and (3) assign guilt without a judicial trial." Hettinga v.

13 See U.S. Const. art. I, § 10.

United States, 677 F.3d 471, 477 (D.C. Cir. 2012), cert. denied, 133 S. Ct. 860 (2013), citing Selective Serv. Sys. v. Minnesota Pub. Interest Research Grp., 468 U.S. 841, 846-47(1984). The defendants do not dispute the satisfaction of the third element, namely, that the Amendments do not provide for a judicial trial.

With respect to the second element, the trial court correctly held that the Amendments do not impose punishment. This Court has summarized the pertinent analysis regarding punishment in the following manner:

> The [United States] Supreme Court has applied three tests to determine whether legislative punishment of the type contemplated by the bill of attainder clauses was imposed: (1) the historical test, involving punishment traditionally judged to be prohibited by the bill of attainder clause, ... including death, imprisonment, banishment, punitive confiscation of property by the sovereign and, in more recent times, laws barring designated individuals or groups from participation in specified employments or vocations...; (2) the functional test, which analyzes whether the law under challenge, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes,... and (3) the motivational test, which inquires whether the legislative record evinces a congressional intent to punish....

Hogan v. Dep't of Children & Families, 290 Conn. 545, 579-80 (2009).

As to the historical test, the fee increases do not constitute punitive confiscation of MERS' property by the sovereign. It is not MERS, but bankers or homeowners, who bear the cost. MOD at 43, Pl. App. at 270. Moreover, a "'bona fide revenue raising measure is not ... confiscation of property.'" Id., quoting Horizon Blue Cross Blue Shield of New Jersey, 425 N.J. Super. at 25.

With respect to the functional test, there is no "grave imbalance" between the burden that the Amendments impose on MERS and the legitimate nonpunitive purpose of raising revenue. MOD at 44, Pl. App at 271, quoting ACORN v. U.S., 618 F.3d 125, 138 (2d Cir 2010), cert. denied, 131 S. Ct 3026 (2011). As the trial court observed, "merely alluding to the fact that MERS is now burdened by the heightened fee, does not automatically entail that it rises to the level of a 'grave imbalance.'" Id. Were that so, virtually any revenue-raising statute could be found to be a bill of attainder, because

> all modern legislation regulating the economic activities of specific groups might be considered "punishments," and the bill of attainder clause, if read too broadly, could be used to cripple the ability of legislatures to respond to some perceived social or economic problem by imposing restrictions or limitations on individuals, corporations, or industries which are deemed responsible for the problem.

Long Island Lighting Co. v. Cuomo, 666 F. Supp. 370, 403 (N.D.N.Y. 1987), aff'd in part and vacated on other grounds, 888 F.2d 230 (2d Cir. 1989). See also Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 472 (1977)("[f]orbidden legislative punishment is not involved merely because the Act imposes burdensome consequences"); ACORN, 618 F.3d at 137(legislative actions affecting a corporation "may be more an inconvenience than punishment"). Here, the recording fee increase is minimal in relation to the value of the underlying transactions to which it applies, and the plaintiffs have stipulated that MERS' overall business has not declined as a result of the legislation. See Joint Stip. ¶¶ 26-28. Pl. App. at 139.

As to the motivational test, "[t]he legislative record by itself is insufficient evidence for classifying a statute as a bill of attainder unless the record reflects overwhelmingly a clear legislative intent to punish." ACORN, 618 F.3d at 141, quoted in MOD at 45, Pl. App. at 272. Here, the legislative history contains no assertions by legislators that MERS committed acts meriting punishment. MOD at 45, Pl. App. at 272. Compare Consol. Edison Co. of New York v. Pataki, 292 F.3d 338, 355 (2d. Cir.), cert. denied Pataki v. Consol. Edison Co. of New York, 537 U.S. 1045 (2002)(noting that a sponsor of the legislation challenged in that case had stated, "Con Edison has done a terrible thing here....And [this] law is going to stop them and punish them."). On the contrary, the legislative record here demonstrates that the General Assembly's goal was to generate revenue for the State and its municipalities. The legislative record further shows that the increased recording fee for a "nominee of a mortgagee" was apparently adopted, not for punitive purposes, but in response to the concerns of the financial industry that requiring every assignment of a mortgage interest to be recorded might burden the national secondary mortgage market, and might also defeat the utility of MERS' business model in Connecticut. See Counter Statement of Facts, supra, p. 4

Finally, the plaintiffs cannot satisfy the first element of the bill of attainder test, which is the requirement of specificity. An essential element of a bill of attainder is its focus on the "past and ineradicable actions" of a particular person or group, rather than on "continuingly contemporaneous fact." See MOD at 37, Pl. App at 264, quoting Communist Party v. Subversive Activities Control Bd, 367 U.S. 1, 86-87 (1961). If a statute has open-ended applicability and does not turn on past conduct, but instead regulates future business decisions, it does not qualify as a bill of attainder, even if, at present, it affects only one person. "'Since virtually all legislation operates by identifying the characteristics of the class benefited or burdened' the mere fact that the 'class' currently happens to contain only one member does not transform an open-ended statute into a bill of attainder." Hettinga, 677 F.3d at 478, quoting BellSouth Corp. v. FCC, 144 F.3d 58, 62 (D.C. Cir. 1998). Adopting a contrary approach would "cripple the very process of legislating, for any individual or group that is made the subject of adverse legislation can complain that the lawmakers could and should have defined the relevant affected class at a greater level of generality." Hettinga, 677 F.3d at 478, quoting Nixon, 433 U.S. at 470.

The trial court's ruling that the Amendments do not constitute bills of attainder should be upheld, because the Amendments do not exact punishment for past acts, and they are open-ended statutes that govern only prospective conduct.

G. The Trial Court Properly Denied The Plaintiffs Claims Brought Pursuant To 42 U.S.C. § 1983

The trial court, having denied all of the plaintiffs' constitutional claims, also denied their ancillary § 1983 and §1988(b) claims. Because "§ 1983 merely provides a mechanism for enforcing individual rights 'secured' elsewhere," but does not itself "protect anyone against anything," Gonzaga Univ. v. Doe, 536 U.S. 273, 285 (2002) citing Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 617 (1979), the trial court's denial of the plaintiffs' § 1983 claims should be affirmed.

CONCLUSION AND STATEMENT OF RELIEF REQUESTED

For all of the foregoing reasons, the defendants respectfully request that this Court affirm the judgment of the trial court.

Respectfully submitted,

Defendants-Appellees

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CERTIFICATION

The undersigned attorney hereby certifies, pursuant to Connecticut Rule of Appellate Procedure § 67-2, that on March 4, 2015:

(1) the electronically submitted brief and appendix has been delivered electronically to the last known e-mail address of each counsel of record for whom an e-mail address has been provided; and

(2) the electronically submitted brief and appendix and the filed paper brief and appendix have been redacted or do not contain any names or other personal identifying information that is prohibited from disclosure by rule, statute, court order or case law; and (3)

the brief and appendix being filed with the appellate clerk are true copies of the brief and appendix that were submitted electronically; and

(4) the brief complies with all provisions of this rule; and

(5) a copy of the brief and appendix has been sent to each counsel of record and to any trial judge who rendered a decision that is the subject matter of the appeal, in compliance with Section 62-7 at the following addresses:

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SUPREME COURT

OF THE

STATE OF CONNECTICUT

S.C. 19376

MERSCORP HOLDINGS, INC., ET AL.
PLAINTIFFS-APPELLANTS

V.

DANNEL P. MALLOY, GOVERNOR, STATE OF CONNECTICUT, ET AL.
DEFENDANTS-APPELLEES

APPENDIX

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General Assembly

January Session, 2013

Raised Bill No. 6325

LCO No. 1576

*01576_____PD_*

Referred to Committee on PLANNING AND DEVELOPMENT

Introduced by:
(PD)

AN ACT CONCERNING THE ASSIGNMENT OF MORTGAGE DEBTS.

Be it enacted by the Senate and House of Representatives in General Assembly convened:

Section 1. Subsection (g) of section 49-10 of the general statutes is repealed and the following is substituted in lieu thereof (*Effective July 1, 2013*):

(g) Any assignment of a mortgage debt shall be recorded. If an assignment is presented for recording more than sixty days after such assignment, the person presenting such assignment for recording shall pay to the town clerk a surcharge equal to two hundred dollars for each week or part of a week following the expiration of the sixty-day period, up to a maximum amount of five thousand dollars. Recordation of an assignment of mortgage debt is not sufficient notice of the assignment to the party obliged to pay for purposes of subsection (d) or (e) of this section.

This act shall take effect as follows and shall amend the following sections:

Section 1	*July 1, 2013*	49-10(g)

Statement of Purpose:

To require any assignment of a mortgage to be recorded not later than sixty days after such assignment.

[Proposed deletions are enclosed in brackets. Proposed additions are indicated by underline, except that when the entire text of a bill or resolution or a section of a bill or resolution is new, it is not underlined.]

-- I totally empathize with you there.

But I still think that the fact that the mediators will be required, now will be required for three and out, so to speak, where it would go before the judge and the hearing, I think will act in an expeditious way.

Thank you.

WILLIAM J. McCUE: We do know that -- we do know one thing. To impose a financial penalty on the borrower will be feeding oats to a dead horse. And if they're not paying the mortgage, they're not paying the taxes and the insurance, they're certainly not going to pay a court fine.

REP. DIMINICO: Well, the penalty, in regards, would be the foreclosure would take place.

WILLIAM J. McCUE: Which is something that probably should be going on already, in -- in my opinion. It should never have been -- you know what? We've delayed it, so we're now going to penalize you by no longer delaying it. That's real -- that really doesn't make an awful lot of sense to me.

REP. DIMINICO: Okay. Thank you.

SENATOR LEONE: Thank you, Mr. McCue.

REP. DIMINICO: Thank you.

SENATOR LEONE: Appreciate that.

Next, Raphe Podolsky. I'm never sure if I get that right; you can correct me, please.

RAPHAEL L. PODOLSKY: Oh, well, the -- the -- Raphael Podolsky is my name. I'm a lawyer with the Legal Assistance Resource Center in

Hartford; we're part of legal aid programs. We -- we do some representation of homeowners -- (inaudible) we're much more likely to represent tenants -- in a foreclosure situation, but I came today because I really do want to speak about this bill. We're strongly in favor of it.

I'm a member of the Bench-Bar Foreclosure Committee and have been on it, I believe, since it was created and have been part of a number of meetings that have talked about how the program works. The foreclosure mediation program has been very effective. It's been very successful. It has a national reputation; we were national leader in developing this program.

Mediation is a win-win approach, and I'm actually very disappointed to hear some of the witnesses from the lending industry speak of it as if it was almost a kind of poison. I'm concerned that some of the arguments that are being made against this bill are actually not arguments against the bill at all but arguments against the entire mediation program, going back to its very beginning.

One of the things we have in Connecticut is judicial foreclosure. There are states that, indeed, move foreclosure cases faster, because foreclosure is treated like a form of repossession of a car. You don't have to go to court to get the foreclosure. We use -- we have judicial foreclosure. Those are the states that tend to be a little bit slower, because we don't take people's homes away from them without a judge going -- we're going through a process by which a judge determines that is the proper solution.

So to the extent that there's an implication here that we ought to go all the way back to the beginning, let's not have a mediation program because we've already done all the mediation on our own, let's, for that matter, not have judicial foreclosure because, after all, that would be faster. I think that sends us on the wrong track and does not help us understand or analyze what we ought to do. And I guess I just feel that needs to be said.

I think that this bill is reasonable. It is targeted specifically to the problems that have occurred. The suggestion that it creates an unlevel playing field, I think, is simply incorrect. As has been pointed out, the penalty for a homeowner who does not make good-faith effort in -- in mediation is that mediation will be terminated. That is by -- that is a very effective sanction, because it's a kind of nuclear sanction. It's going to accelerate the -- it's going to move them right into foreclosure. That's not the -- the equivalent sanction with equivalent force for the lender has to be some form of penalty sanctions for having failed to bargain in good faith. So I don't see that as nothing against the borrower but everything against the lender. I don't think that's true at all.

I wanted to make comments on two parts of the bill, that are not sort of the core parts of the bill, but I wanted to say something on, and that's Section 6 and Section 8. And I'll be very quick on those.

SENATOR LEONE: If you could summer up, that would be great.

RAPHAEL L. PODOLSKY: Section 6 is the one that's -- makes -- that makes clear that there are wider range of defenses available in foreclosure, which is, in fact, an equitable proceeding.

And the -- the homeowner can raise equitable defenses. I think that's very good and very important.

And the Section 8, which deals with making sure the land records are transparent, that -- that assignments of the mortgage dead need to be filed on the land records, we -- I support that as well.

I'm happy to answer questions on anything that I've submitted testimony on, but that's the essence of the testimony.

SENATOR LEONE: Alberts.

REP. ALBERTS: Thank you, Mr. Chairman.

And thank you for your testimony.

Section 8, you -- you support it; why?

RAPHAEL L. PODOLSKY: Well, it's -- it -- it accomplishes a number of things. It -- one of the reasons that this was never an issue until, maybe 15 to 20 years ago, when -- when MERS kind of spread as a -- as an entity is that typically the mortgage and the note moved together, so that when the mortgage was assigned, the note was assigned with it.

The Connecticut Supreme Court has said -- and this is long-standing law in Connecticut -- that it's -- it's actually the note that's predominant. Then the mortgage follows the note; it secures the note. And so, for example in order to be able to bring a foreclosure action, you need to have the note. Having the -- the mortgage is not good enough because that -- that's just security; it's not what -- it's not the actual debt. But that didn't used to be an issue because they moved together, so it didn't matter if you -- if you separately recorded both on the land records.

The MERS system works on the assumption that you will separate the mortgage from the note. The person who owns the note, who has the right to foreclose is not necessarily the person who has the mortgage. And, well, so you -- and what you can do is you file the mortgage transfer on the land records and then move the note from -- from entity to entity to entity to entity so that it becomes very difficult to figure out who -- who is the actual entity to which the homeowner owes the debt.

So what -- what Section 8 does is, in part, it restores that level of transparency and integrity to land records. And that -- that's been a national issue about what are the -- what are the consequences of having separated these things. It's -- it then has a collateral effect of applying the recordation fees that both municipalities and states always thought were being applied.

The reason you had somebody testifying about the Community Investment Act, because that's money that doesn't come in, because the mortgage, and since the mortgage is not being retransferred but only the -- the mortgage dead, nobody's, you know, it's not being recorded. It's being recorded with MERS, which is a private recording system, but it's not being recorded on land records. And so, I mean, I guess those are the reasons. You asked me why we take that position; that's -- that's why I take that position.

A part of the money that goes to the Community Investment Fund, for example, goes to CHFA for affordable housing. That money doesn't come in when -- if -- if a way has been devised to

REP. TONG: Thank you, very much, for waiting to testify this evening.

Anybody else; any questions?

Thanks, so much.

ANITA L. MIELERT: Thank you.

REP. TONG: Fred Weinle. You're not Fred.

JEFF SANDIS: I'm not Fred Weinle, I'm Jeff Sandis; Fred is my client. He had to leave to pick up his wife, but his written testimony, a story about his 21 mediation is in the pack.

REP. TONG: Thank you.

Bill Hultman.

Good evening.

WILLIAM C. HULTMAN: Good evening, Chairman, Mr. Chairman, both Mr. Chairmans, and members of the committee.

I'm Bill Hultman. I'm the Legislative Affairs person for MERSCORP Holdings, Inc., which is the parent corporation of Mortgage Electronic Registration Systems, Inc., which -- commonly known as "MERS," -- which we've heard a little bit about here from some of the prior witnesses.

What MERS does -- and I think at one point, I think Senator Leone called this the "MERS Section," which is Section 8. It's really -- that's really a misnomer because, historically, since the beginning of the advent of the secondary market, either MERS or the servicer has served as the mortgagee in the land records. So this doesn't apply strictly to MERS, it actually applies to anybody who acts as an agent for an investor or lender who owns the actual certificate of indebtedness on this loan. So what MERS does is we act as the mortgagee, at the request of the homeowner. They make us the mortgagee in the records, and then as the loan is sold in the secondary market, we represent the various parties in the land records, as their agent.

So in this section, the two public policy arguments that are usually made in support of this kind of position that we should record all assignments are really twofold. One, as you heard, is the revenue issue; however, the revenue issue could be done much more efficiently than the current way the bill is structured. So, in this case, if every time a note is sold or transferred (inaudible) has to pay into the land records or pay some new organization that's going to have to be created. Unfortunately, because the fact is that most transfers of notes are not recordable conveyances, they do not need to be recorded in the land records. So most of this will not be -- result in anything, this particular version won't record -- won't represent any difference in -- in terms of the number of documents that are actually recorded with the town clerks.

Actually, in most of the cases, in -- in almost state there is no obligation to record assignments of the mortgage lien, which is what we -- what we hold title to. We hear issues that there are title issues involved, yet the title insurance agency routinely, every day insures MERS mortgages. It actually insures sales of properties out of foreclosures.

There are no title problems. In fact, before MERS was created, there were title problems because people didn't record assignments that would otherwise have been made. And at the point that that's done and somebody goes to foreclosure or refinance or sell their house, the chain of title was broken, and then the homeowner is the one who's obligated to fix the problem because he has the title and the loan. So we would argue that.

And the other thing, I think, you need to keep in mind is that nobody else in the United States today has any kind of requirement like this to record all assignments. That would put Connecticut in a disadvantaged position in the national market. It will raise costs in the State of Connecticut for homeowners. You've already seen some of the other provisions of the bill are going to raise costs; this would further raise costs.

It -- it -- when it sounds good that you're -- you think that the banks are going to pay these fees, but as a result of the -- these fees, they either get charged directly to the homeowner at closing -- because they know they're going to do an assignment, it'll go directly on the HUD-1 -- or you'll get higher cost in terms of fees and points that are assigned to a loan to cover these costs. So banks -- this is not a competitive process, you know, there's no competitive advantage -- the banks are just going to pass these fees onto the homeowners.

So I -- I hear my time is up, so I'll stop and try to answer any questions you might have. And I do have a sheet that we can turn into the committee with all these points that -- for your consideration.

REP. TONG: Yeah, that'd be very helpful; you haven't submitted that yet, that --

WILLIAM C. HULTMAN: I don't think we did. I think I -- I did it the other day and I don't -- I'm not sure that anybody has submitted on my behalf yet.

REP. TONG: Okay. Thank you.

Any questions?

Senator Leone.

SENATOR LEONE: Thank you.

A question on the MERS I want to understand the process. So when a -- when -- when a mortgage is sold or transacted through the MERS system, is it -- how's it recorded? I'm not really worried about so much the fee structure, in terms of the -- the language at the moment, but on -- from what I'm hearing, especially from previous testimonies, such as the town clerks' on the transactions and the mortgage, the person who owns the home sometimes doesn't know who owns -- who holds the note. And wouldn't MERS be responsible, if it's being transacted multiple times?

WILLIAM C. HULTMAN: There's two answers to your question. First of all, in today's world -- historically, there might have been an issue, four or five years ago, about trying -- for homeowners to not know who owns their loan. Federal law has taken care of that. There are two separate federal laws that provide the -- that information. The servicers must give that information and the purchasers of a loan must give that information to the homeowners at specific times; so federal law has dealt with that problem about homeownership. MERS will also, if it's registered on MERS.

And as you heard, we do hold a predominance of the mortgages. We hold the mortgage lien on behalf of the investors for practically 60 percent of loans. So you can come to the MERS for free and either by -- re telephone, get that.

So what happens in MERS is when the loan is closed, the homeowner, in its mortgage document, makes MERS the mortgagee as an agent for the original lender. So we hold title to the mortgage lien and the original lender gets his note. Now, that's a negotiable instrument; it's not a real estate conveyance.

And when that homeowner -- when that lender sells that note into the secondary market, usually to an aggregator who then sells it to the final investor, whether it's Freddie Mac or Fannie Mae or Ginnie Mae or some Wall Street trust, we became the agent of subsequent -- the purchasers of that loan. There is no break in chain of title because title is grounded in our name. So from the time the loan is closed to the time that the loan is satisfied and a lien release is filed, we hold title to the loan. So there are no title issues; that's a misnomer and a misunderstanding of how the MERS system operates.

SENATOR LEONE: Yeah, but -- well, it does sound a little complicated. I'm trying to make sure I follow. So but there's multiple -- there could be multiple transfers of the note; correct?

WILLIAM C. HULTMAN: That's correct.

SENATOR LEONE: And -- and I, and from what I'm hearing from the other side is that that makes it difficult to find out who actually owns the note if -- if it goes through the mediation --

WILLIAM C. HULTMAN: But --

SENATOR LEONE: -- process.

WILLIAM C. HULTMAN: -- historic, because for 35 years the investors have not been in the land records; it's either been the servicer or MERS. So I don't know what people did before the crisis, but they didn't seem to have a problem.

Today, because there were issues of that, Senator Boxer passed a law in 2009, saying that every time the loan is transferred, the purchaser is obligated under federal law to give notice to the homeowner of who owns that loan. And if he loses that piece of paper, then the -- he can ask the servicer. He or she could ask the servicer, and the servicer is obligated under federal law to tell them who owns the loan. So they don't need to go to the land records for that information; they've historically haven't been able to do this.

SENATOR LEONE: Okay. Thank you.

I'll -- I may have further questions down the road, but I'd --

WILLIAM C. HULTMAN: I'll be --

SENATOR LEONE: -- love to get that --

WILLIAM C. HULTMAN: -- happy to --

SENATOR LEONE: I'd love to get that documentation that you said you have so that we can dive --

WILLIAM C. HULTMAN: I'll be happy --

SENATOR LEONE: -- into it --

WILLIAM C. HULTMAN: -- to submit that.

SENATOR LEONE: -- a little bit further.

WILLIAM C. HULTMAN: And if you have any questions, please feel free to call me.

SENATOR LEONE: Thank you.

REP. TONG: Representative Moukawsher.

REP. MOUKAWSHER: Thank you.

You know, I -- I have sort of a -- a recollection of some problems that -- that were the result of the MERS system, and there's been, you know, legal challenges and to foreclosures. As a result, there was a -- as I understand it -- there was a suspension of foreclosures by some banks, because apparently there were assignments and affidavits and other documents that were, you know, created after, you know, subsequent to or -- or to -- to sort of document assignments that didn't happen.

And, I mean, it seems to me there are problems with -- with this system because people haven't known who, you know, their lender was. And there have been foreclosures that were initiated by -- by banks who didn't actually hold title. I'm not sure. I think you're -- well, maybe you can explain --

WILLIAM C. HULTMAN: Well --

REP. MOUKAWSHER: -- it to me better. I -- I'm not -- I'm not --

WILLIAM C. HULTMAN: Let me --

REP. MOUKAWSHER: -- an expert --

WILLIAM C. HULTMAN: -- say this.

REP. MOUKAWSHER: -- on this, by any means.

WILLIAM C. HULTMAN: First of all, there's not been a court in the United States that has held that a MERS mortgage is invalid. So from that standpoint, that's not been an issue.

Yes, there have been a lot of legal challenges, and for the most part, except for limited circumstances, once in court, there have been court decisions at a trial level that have gone against us. But when they've been appealed, in 98 percent of the cases, we have prevailed in those cases. And in the limited cases where we haven't prevailed, it's usually because there was some technical -- that somebody did not do what they were supposed to do during the course of the foreclosure proceeding; they didn't show up with the proper proof or they didn't have the right paperwork.

And those are reported in the papers as being a MERS loss, but they're not -- not that. It's not really a loss, it's really they just have to restart the foreclosure. So, yes, there's been a lot of publicity. There's been a lot of litigation. But none of it has changed the MERS business model in any -- any material respect.

REP. MOUKAWSHER: Yeah. Does MERS, you know, file foreclosures as themselves?

WILLIAM C. HULTMAN: We stopped. There was a period, up until July of 2011, where MERS would let the MERS members prosecute foreclosures in our name, but we stopped doing that and in July of 2011. So at this point, they actually have to create an assignment from MERS to the foreclosing party and record that, according to our rules and our processes.

REP. MOUKAWSHER: Okay. And that -- and that foreclosing party, who is that? I mean --

WILLIAM C. HULTMAN: Generally, in most cases, it's the servicer.

REP. MOUKAWSHER: Okay; so who actually owns the loan?

WILLIAM C. HULTMAN: Well, an investor owns the loan. But what they do is they can transfer the note, because these are negotiable instruments, and they make the servicer the holder of the instrument. And under UCC, it's the holder of the instrument that is -- that person is entitled to enforce the note.

REP. MOUKAWSHER: All right. Let -- let me say I'm a homeowner and, you know, all I know is there's a servicer that sends me a bill every month. And there's a problem, you know, in -- in crediting payment or I have some problem with, you know, who's actually, you know, they -- they're not -- they're not keeping track of what I paid; there's been some mistakes. How does the homeowner know who -- for instance, if they wanted to make a claim against that party, who do they --

WILLIAM C. HULTMAN: They can --

REP. MOUKAWSHER: How do they identify --

WILLIAM C. HULTMAN: -- ask the servicer, and the servicer will tell them who the owner is.

REP. MOUKAWSHER: And who is the owner? I mean, if --

WILLIAM C. HULTMAN: It --

REP. MOUKAWSHER: Is it MERS or --

WILLIAM C. HULTMAN: MERS holds legal title to the mortgage lien, which means we -- we are an agent of the investor. The investor is either one of the general, the GSEs, the government-sponsored entities, like Freddie Mac, Fannie Mae, Ginnie Mae; it could be a Wall Street trust; it could be a bank. So there's a -- parties that own these loans. They're -- they have delegated the authority to the servicer to collect payments and administer the loan on their behalf.

Because they're investors, they're not lenders, they don't have the loan files. They don't have the ability to make loans. They're investors; they sell interests in those loans to the worldwide community market that provide liquidity and capital in the mortgage market.

REP. MOUKAWSHER: Let's say if MERS didn't exist, you know, we didn't have this sort of surrogate or, you know -- I don't know how you characterize MERS but it's -- it's not party in interest. If we didn't have that system, would -- would the actual, you know, investor or owner have to record --

WILLIAM C. HULTMAN: No.

REP. MOUKAWSHER: -- a summons?

WILLIAM C. HULTMAN: Because before MERS, it was the servicer that generally was sitting in the land records on behalf of the investor. Freddie Mac and Fannie Mae and Ginnie Mae, expressly by their rules, do not permit the loan to be assigned to them when their loan is sold to them.

They don't want to be in the land records for two reasons: One is they have delegated the authority to administer the loan to the servicer. They are not servicers. They cannot -- they don't -- they have a small staff; they don't have the -- the infrastructure to deal with homeowners. That's what they have delegated to the -- to the servicers.

Plus, they don't want to get the service of process, which is why -- what is another result of being in the land records. So if there's other foreclosure activities, there's tax liens, there's other paperwork that gets served on them because of them being in the land records, they deal with it. And Freddie Mac and Fannie Mae are not equipped to deal with those kinds of -- of legal process.

So it would increase the cost of homeownership. As I said before, in the old days when -- when assignments were done before, they wouldn't get done, because people would forget or people make mistakes or they don't do what they're supposed to do. And then when there's a break in the chain of title -- because then there is a break in the chain of title -- it's the homeowner who will pay the cost of clearing title, which is an expensive process. And they're bear the burden of it, particularly if the originating lender has gone some place and it has disappeared.

REP. MOUKAWSHER: That sounds very, you know, intricate and confusing to me. I mean, I -- I know. I've -- I've handled closings where MERS was sort of the -- it's an agent for whoever was actually lending the money. And if you're to do a title policy, it would identify the original lender. But I, you know, that could be sold, and then that original lender, as you're saying -- I guess you're saying that it could be anybody that owns it, and a Wall

Street trust, a -- so you don't really know who owns your mortgage, I guess.

WILLIAM C. HULTMAN: Well, with due, all due respect --

REP. MOUKAWSHER: Yeah. No, I --

WILLIAM C. HULTMAN: -- because I --

REP. MOUKAWSHER: Please.

WILLIAM C. HULTMAN: I talk to homeowners every week, because when they call and we can't get them to talk to a servicer, I get the call. Homeowners do know. Because of the changes in federal law, they do know who owns their loan today. Most of the time they're just checking to make sure that it's right on my system not that they don't know who it is.

And keep in mind, because the investors are not lenders, they don't have the loan file. They are limited in what they can do to help them. They're just going to send them back to the servicer anyway.

REP. MOUKAWSHER: Uh-huh. So if we -- if we enacted this Section 8 and, you know, required assignments, what would that -- what would the outcome of that be?

WILLIAM C. HULTMAN: Cost of housing in -- in your state will go up.

REP. MOUKAWSHER: But we'd, you know, it -- it would what, go up by, like, $53 every time you have to record one or --

WILLIAM C. HULTMAN: Well, it's a misnomer to think that just the filing fees are the fees that would cost. There has to be infrastructure for even the -- even the limited amount of work that you would have to do to satisfy Section 8 today. The banks would have to create additional infrastructure to manage this process. This is not a -- it isn't just something you can do on the side. These, you need people and you need processes, and there's computer programming. All of those costs, together with the filing fees will be passed on to the homeowner. So the homeowners will pay more money to get loans in your state.

REP. MOUKAWSHER: And that was what the system was before we debarked on this MERS system, I guess. I mean a -- a bank would have to keep track of things.

WILLIAM C. HULTMAN: And it didn't work very well, and that's why MERS is here today. MERS was a fix to the problems in the system that existed prior to MERS becoming into place, because of breaks in the chain of title.

REP. MOUKAWSHER: Why? I'm -- I'm quizzing you a little bit but I'm not trying --

WILLIAM C. HULTMAN: People don't --

REP. MOUKAWSHER: -- to give you a hard time.

WILLIAM C. HULTMAN: People don't do what they're supposed to do.

REP. MOUKAWSHER: Yeah, well --

WILLIAM C. HULTMAN: They'd keep --

REP. MOUKAWSHER: -- that's --

WILLIAM C. HULTMAN: They -- they wouldn't -- they wouldn't record the assignment. They would forget or they would not want to pay the fee, and they wouldn't record it. And then when the homeowner went to refinance, he had a problem.

REP. MOUKAWSHER: Okay. Well, I mean I -- I assume MERS can make a mistake, once in a while, as well. So, but I know you (inaudible) --

WILLIAM C. HULTMAN: There is less chance for MERS to make a mistake because we're in the title. The mortgage is recorded. The title is bound in our name. And it only gets out of the land records when the loan is satisfied and the lien release is filed. So there's -- there's less -- less chance for error.

REP. MOUKAWSHER: Well, I want to put you through your paces, just so I could learn something. I, you know, I appreciate --

WILLIAM C. HULTMAN: I'm --

REP. MOUKAWSHER: -- you know --

WILLIAM C. HULTMAN: -- happy to --

REP. MOUKAWSHER: -- your perspective (inaudible).

WILLIAM C. HULTMAN: I'm happy to answer all the questions. That's what I'm here for.

REP. MOUKAWSHER: All right. Well, I'll look into it more. And thank you.

WILLIAM C. HULTMAN: Okay; thank you.

REP. TONG: Any other questions?

Thank you.

WILLIAM C. HULTMAN: Okay. Thank you.

REP. TONG: Jessica Huppenbauer. Yes, Jessica.

To:	*Sen. Cassano and Rep. Rojas and members of the Planning and Development Committee*
From:	Denis R. Caron
Re:	HB 6325 An Act Concerning the Assignment of Mortgage Debts
Date:	March 11, 2013

I am a vice president of Commonwealth Land Title Insurance Company, a national title insurer doing business in the state of Connecticut. I am also co-author of *Connecticut Foreclosures: An Attorney's Manual of Practice and Procedure.* I am here today to speak in opposition to HB 6325 "An Act Concerning the Assignment of Mortgage Debt." The bill proposes to amend subsection (g) Conn. Gen. Stat. §49-10 to require the recording of an assignment whenever a mortgage debt is transferred.

This bill is an obvious attack on the manner in which a large part of the national secondary mortgage market operates under a program known as Mortgage Electronic Registration Systems ("MERS"). The MERS model involves separating the mortgage note from the mortgage deed. The note is payable to the original lender, and the mortgage is given in favor of MERS as nominee for that lender. As the note is sold in the secondary market, the note is endorsed to the new purchaser, but the mortgage remains in the name of MERS, and when the loan is paid, the release of mortgage is given by MERS. This business model has had a tremendous effect in reducing the number of title issues that can arise at the closing table, as I describe below.

If this bill were to become law, the MERS model would effectively be outlawed in Connecticut. The expressed policy reason for this bill is that the MERS system prevents a borrower from discovering the true identity of his lender. The perceived issue is also the motivation behind Section 8 of Governor's Bill 6355, which also seeks to amend subsection (g) of Conn. Gen. Stat. §49-10, as well as Raised Bill 1102, which seeks to repeal Conn. Gen. Stat. §49-17.

I believe that all of these proposals, which presumably are intended to assist borrowers in their relationships with their lenders, are ill-advised, and will result in borrowers being faced with additional expenses and delays when they attempt to sell or refinance their properties. This is because imposing a requirement that all assignments of mortgage be recorded will inevitably result in a title defect, known in my business as a break in the chain of title, which occurs if one of the assignees of the mortgage neglects to record its assignment. When the mortgage is finally paid, a release of mortgage is issued by the lender who receives the payment, and that release is recorded in the land records to clear title and to enable a sale or refinance to proceed. If there was a break in the chain of mortgage assignments, however, then the release is of no effect and title to the property becomes unmarketable.

This is not an unusual or even uncommon event. Not all lenders participate in MERS, and those non-participating lenders encounter this problem on a regular basis. The usual way to resolve it is for the title insurance company to agree to insure over the defect, but only if the owner executes an indemnity agreement with the company, whereby the owner agrees to chase down and record the missing assignment. The title company generally will also exact a security deposit, usually in the amount of $2500-$4000, to ensure that the owner fulfills his obligations. Although the owner will be able to recover the funds later on, this is always an unexpected and unwelcome surprise. Sometimes, especially in a short sale, there are no funds available, and this can kill the deal. On a resale, the seller may have been counting on the proceeds from the sale as part of the equity to be reinvested in the purchase of a new property. The presence of MERS has greatly reduced the frequency of such unfortunate incidents; if MERS were to be eliminated from the equation, without doubt many homeowners would be seriously prejudiced. This is a classic case of possibly well-meaning legislation resulting in unintended consequences that would seriously harm the very people the bill is intended to help.

Talking Points in Opposition to Connecticut HB 6355 & HB 6325
(Requiring that (1) a fee be paid for every mortgage assignment not recorded in the municipal land records and (2) any assignment of debt be recorded in the municipal land records.)

- **The bill is unnecessary.** Public policy rationales for the bills are unsupportable. The main reason usually cited in support of these bills is that homeowners need to be able to find out who owns their loan from the public land records. The land records have not provided disclosure of the ownership of loans since the advent of the secondary market. Agents (like MERS or the servicer) have generally held the mortgage lien on behalf of the owners of the loan; a concept well recognized by the law. Moreover, Federal law already requires disclosure to homeowners about the owners of their loan.[1] The MERS® System also provides free access (through a toll free telephone number or the internet) to the general public to identify the current servicer for loans registered on the MERS® System, and the identity of the owner of the loan to the homeowner.

- **Better means of increasing state and local receipts are available.** The fiscal rationale of increased government revenues from recording fees for assignments ignores (1) the costs that will be incurred to process the increased work-load in a timely manner and (2) disruptions in existing processes causing other unintended consequences (see last bullet). The better fiscal solution is to increase recording fees for in a more efficient manner that does not result in additional work for town registers or require a new process of reporting and collecting a new fee.[2] Examples could include increasing the fee for recording subsequent pages, which has not been substantially increased in recent years, or increasing the fee to record the mortgage.

- **The bill is anti-consumer.** Costs associated with additional recording fees and the need for additional infrastructure for lenders and servicers (to process these assignments) will be borne by homeowners. The cost of the first assignment is directly charged to the homeowner at closing and the costs of subsequent assignments will be passed on indirectly through higher fees and interest rates charged by lenders.

- **The bill will make lending in Connecticut uncompetitive.** No other state has this requirement. Higher costs and more complexity in the law, which will result if the bill is enacted, will cause national lenders to deploy their more of their capital in those states where market conditions are more favorable, and less capital in Connecticut.

- **Missing intervening assignment will result in title issues that will have to be cleared by homeowners at their cost.** This bill overturns existing state law that has been in place for hundreds of years. Recording liens is for the benefit of creditors to provide notice to third parties of their lien. There are often intervening transfers that do not impact the homeowner; they are often for short periods of time and creditors elect not to record them for reasons of cost and efficiencies. Regardless of any statute, in many cases, intervening transfers will not get recorded because people will make mistakes.[3] In these cases, when the homeowners go to refinance his loan or sell his home, he or she will bear the case of fixing the title (inevitably some of the parties may not be in business so the homeowner will not have recourse against them). Title agents may also have difficulty identifying all of the intervening transfers, which may prevent them from being able to insure title.

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[1] Federal legislation passed in 2009 (Section 404 of the Truth in Lending Act) requires that anyone who acquires ownership of a mortgage loan must provide the borrower with a notice that the acquirer is the new owner (and if they use a servicing agent to collect payments, the name of the servicer). The Section 1463 of the Dodd-Frank legislation enacted in 2010 also requires servicers to disclose the owner of the loan within ten days upon written request from the borrower.

[2] Enactment of GB 6355 contemplates that a new infrastructure would be established to collect fees at the state level.

[3] Contrary to many assertions otherwise, MERS was created because of problems in the industry arising from problems associated with missing intervening assignments.

Connecticut General Statutes Annotated
Title 7. Municipalities
Chapter 92. Town Clerks

C.G.S.A. § 7-34a

§ 7-34a. Fees

Effective: July 15, 2013
Currentness

(a) (1) Town clerks shall receive, for recording any document, ten dollars for the first page and five dollars for each subsequent page or fractional part thereof, a page being not more than eight and one-half by fourteen inches. Town clerks shall receive, for recording the information contained in a certificate of registration for the practice of any of the healing arts, five dollars. Town clerks shall receive, for recording documents conforming to, or substantially similar to, section 47-36c, which are clearly entitled "statutory form" in the heading of such documents, as follows: For the first page of a warranty deed, a quitclaim deed, a mortgage deed, or an assignment of mortgage, ten dollars; for each additional page of such documents, five dollars; and for each assignment of mortgage, subsequent to the first two assignments, two dollars. Town clerks shall receive, for recording any document with respect to which certain data must be submitted by each town clerk to the Secretary of the Office of Policy and Management in accordance with section 10-261b, two dollars in addition to the regular recording fee. Any person who offers any written document for recording in the office of any town clerk, which document fails to have legibly typed, printed or stamped directly beneath the signatures the names of the persons who executed such document, the names of any witnesses thereto and the name of the officer before whom the same was acknowledged, shall pay one dollar in addition to the regular recording fee. Town clerks shall receive, for recording any deed, except a mortgage deed, conveying title to real estate, which deed does not contain the current mailing address of the grantee, five dollars in addition to the regular recording fee. Town clerks shall receive, for filing any document, five dollars; for receiving and keeping a survey or map, legally filed in the town clerk's office, five dollars; and for indexing such survey or map, in accordance with section 7-32, five dollars, except with respect to indexing any such survey or map pertaining to a subdivision of land as defined in section 8-18, in which event town clerks shall receive fifteen dollars for each such indexing. Town clerks shall receive, for a copy, in any format, of any document either recorded or filed in their offices, one dollar for each page or fractional part thereof, as the case may be; for certifying any copy of the same, two dollars; for making a copy of any survey or map, the actual cost thereof; and for certifying such copy of a survey or map, two dollars. Town clerks shall receive, for recording the commission and oath of a notary public, ten dollars; and for certifying under seal to the official character of a notary, two dollars.

(2) (A) Notwithstanding any other provision of this subsection and in accordance with subsection (h) of section 49-10, town clerks shall receive from a nominee of a mortgagee for the recording of any document, including, but not limited to, a warranty deed, a quitclaim deed, a mortgage deed, or an assignment of mortgage, except (i) an assignment of mortgage in which the nominee of a mortgagee appears as assignor, and (ii) a release of mortgage, as described in section 49-8, by a nominee of a mortgagee, as follows: For the first page of such warranty deed, quitclaim deed, mortgage deed, or assignment of mortgage, one hundred sixteen dollars; for each additional page of such deed or assignment, five dollars; and for each assignment of mortgage, subsequent to the first two assignments, two dollars.

(B) In accordance with subsection (h) of section 49-10, and in addition to any fees received pursuant to subdivision (1) of this subsection for the recording of (i) an assignment of mortgage in which a nominee of a mortgagee appears as assignor, or (ii) a release of mortgage by the nominee of a mortgagee, town clerks shall receive from a nominee of a mortgagee for the recording of such an assignment, as follows: For the entire such assignment of mortgage or release, one hundred fifty-nine dollars. No other fees shall be collected from the nominee for such recording.

(C) For purposes of this subdivision, "nominee of a mortgagee" means any person who (i) serves as mortgagee in the land records for a mortgage loan registered on a national electronic database that tracks changes in mortgage servicing and beneficial ownership interests in residential mortgage loans on behalf of its members, and (ii) is a nominee or agent for the owner of the promissory note or the subsequent buyer, transferee or beneficial owner of such note.

(b) The fees set forth in subsection (a) of this section received by town clerks for recording documents include therein payment for the return of each document which shall be made by the town clerk to the designated addressee.

(c) Compensation for all services other than those enumerated in subsection (a) of this section which town clerks are required by the general statutes to perform and for which compensation is not fixed by statute shall be fixed and paid by the selectmen or other governing body of the town or city in which such services are performed.

(d) In addition to the fees for recording a document under subsection (a) of this section, town clerks shall receive a fee of three dollars for each document recorded in the land records of the municipality. Not later than the fifteenth day of each month, town clerks shall remit two-thirds of the fees paid pursuant to this subsection during the previous calendar month to the State Librarian for deposit in a bank account of the State Treasurer and crediting to the historic documents preservation account established under section 11-8i. One-third of the amount paid for fees pursuant to this subsection shall be retained by town clerks and used for the preservation and management of historic documents. The provisions of this subsection shall not apply to any document recorded on the land records by an employee of the state or of a municipality in conjunction with said employee's official duties. As used in this section "municipality" includes each town, consolidated town and city, city, consolidated town and borough, borough, district, as defined in chapter 105 or chapter 105a,[1] and each municipal board, commission and taxing district not previously mentioned.

(e) In addition to the fees for recording a document under subsection (a) of this section, town clerks shall receive a fee of forty dollars for each document recorded in the land records of the municipality. The town clerk shall retain one dollar of any fee paid pursuant to this subsection and three dollars of such fee shall become part of the general revenue of the municipality and be used to pay for local capital improvement projects, as defined in section 7-536. Not later than the fifteenth day of each month, town clerks shall remit thirty-six dollars of the fees paid pursuant to this subsection during the previous calendar month to the State Treasurer. Upon deposit in the General Fund, such amount shall be credited to the community investment account established pursuant to section 4-66aa. The provisions of this subsection shall not apply to any document recorded on the land records by an employee of the state or of a municipality in conjunction with such employee's official duties. As used in this subsection, "municipality" includes each town, consolidated town and city, city, consolidated town and borough, borough, and district, as defined in chapter 105 or 105a, any municipal corporation or department thereof created by a special act of the General Assembly, and each municipal board, commission and taxing district not previously mentioned.

Credits

(1963, P.A. 528, §§ 1, 2; 1971, P.A. 286; 1972, P.A. 150; 1974, P.A. 74-56; 1975, P.A. 75-154; 1976, P.A. 76-271, § 1; 1977, P.A. 77-478, § 4, eff. July 1, 1977; 1977, P.A. 77-614, §§ 139, 587, eff. Jan. 1, 1979; 1978, P.A. 78-303, § 85, eff. June 6, 1978; 1981, P.A. 81-34, § 8, eff. July 1, 1982; 1982, P.A. 82-323, § 1; 1985, P.A. 85-60; 1985, P.A. 85-257; 1985, P.A. 85-385, § 1; 1989, P.A. 89-217, § 1, eff. July 1, 1989; 1990, P.A. 90-175, § 1, eff. July 1, 1990; 1993, P.A. 93-389, § 2, eff. July 1, 1993; 2000, P.A. 00-92, § 2; 2000, P.A. 00-146, § 1, eff. July 1, 2000; 2000, June Sp.Sess., P.A. 00-1, § 25, eff. July 1, 2000; 2001, P.A. 01-79, § 2; 2005, June Sp.Sess., P.A. 05-3, § 113, eff. June 30, 2005; 2005, P.A. 05-288, § 37, eff. July 13, 2005; 2005, P.A. 05-228, § 5; 2006, P.A. 06-163, § 1, eff. June 6, 2006; 2007, P.A. 07-133, § 1, eff. July 1, 2007; 2007, P.A. 07-252, § 54, eff. July 1, 2007; 2007, P.A. 07-217, § 13, eff. July 12, 2007; 2009, P.A. 09-229,

Connecticut General Statutes Annotated
Title 49. Mortgages and Liens
Chapter 846. Mortgages (Refs & Annos)

C.G.S.A. § 49-10

§ 49-10. Assignment of mortgage debt. Form of instrument. Requirements. Sufficient notice of assignment. Allocation of recording fees paid by a nominee of a mortgagee. Operation of executed assignment

Effective: July 15, 2013
Currentness

(a) As used in this section, "mortgage debt" means a debt or other obligation secured by mortgage, assignment of rent or assignment of interest in a lease.

(b) Whenever any mortgage debt is assigned by an instrument in writing containing a sufficient description to identify the mortgage, assignment of rent or assignment of interest in a lease, given as security for the mortgage debt, and that assignment has been executed, attested and acknowledged in the manner prescribed by law for the execution, attestation and acknowledgment of deeds of land, the title held by virtue of the mortgage, assignment of rent or assignment of interest in a lease, shall vest in the assignee. An instrument substantially in the following form is sufficient for such assignment:

Know all Men by these Presents, That .... of .... in the county of .... and state of .... does hereby grant, bargain, sell, assign, transfer and set over a certain (mortgage, assignment of rent or assignment of interest in a lease) from .... to .... dated .... and recorded in the records of the town of .... county of .... and state of Connecticut, in book .... at page ....

In Witness Whereof .... have hereunto set .... hand and seal, this .... day of .... A.D. ....

Signed, sealed and delivered in the presence of

(SEAL)

(Acknowledged)

(c) In addition to the requirements of subsection (b) of this section, whenever an assignment of any residential mortgage loan (1) made by a lending institution organized under the laws of or having its principal office in any other state, and (2) secured by mortgage on residential real estate located in this state is made in writing, the instrument shall contain the name and business or mailing address of all parties to such assignment.

(d) If a mortgage debt is assigned, a party obliged to pay such mortgage debt may discharge it, to the extent of the payment, by paying the assignor until the party obliged to pay receives sufficient notice in accordance with subsection (f) of this section that the mortgage debt has been assigned and that payment is to be made to the assignee. In addition to such notice, if requested by the party obliged to pay, the assignee shall furnish reasonable proof that the assignment has been made, and until the assignee does so, the party obliged to pay may pay the assignor. For purposes of this subsection, "reasonable proof" means (1) written notice of assignment signed by both the assignor and the assignee, (2) a copy of the assignment instrument, or (3) other proof of the assignment as agreed to by the party obliged to pay such mortgage debt.

(e) If a mortgage debt is assigned, a party obliged to pay such mortgage debt who, in good faith and without sufficient notice of the assignment in accordance with subsection (f) of this section, executes with the assignor a modification or extension of the mortgage, assignment of rent or assignment of interest in a lease, shall have the benefit of such modification or extension, provided, the assignee shall acquire corresponding rights under the modified or extended mortgage, assignment of rent or assignment of interest in a lease. The assignment may provide that modification or extension of the mortgage, assignment of rent or assignment of interest in a lease, signed by the assignor after execution of the assignment, is a breach by the assignor of the assignor's contract with the assignee.

(f) Notice of assignment is sufficient for purposes of subsections (d) and (e) of this section if the assignee notifies a party obliged to pay the mortgage debt (1) by mailing to the party obliged to pay, at the party's last billing address, a notice of the assignment identifying the instrument and mortgage debt assigned, the party obliged to pay such debt, the names of the assignor and assignee, the date of the assignment, and the name and address of the person to whom payments should be made, (2) by giving notice of the assignment pursuant to 12 USC Section 2605, Section 6 of the federal Real Estate Settlement Procedures Act of 1974 and the regulations promulgated pursuant to said section, as from time to time amended, or (3) by giving actual notice of the assignment, reasonably identifying the rights assigned, in any other manner. No signature on any such notice is necessary to give sufficient notice of the assignment under this subsection and such notice may include any other information.

(g) Recordation of an assignment of mortgage debt is not sufficient notice of the assignment to the party obliged to pay for purposes of subsection (d) or (e) of this section.

(h) Notwithstanding the provisions concerning remittance and retention of fees set forth in section 7-34a, the recording fees paid in accordance with subsections (a), (d) and (e) of said section 7-34a by a nominee of a mortgagee, as defined in subdivision (2) of subsection (a) of said section 7-34a, shall be allocated as follows: (1) For fees collected upon a recording by a nominee of a mortgagee, except for the recording of (A) an assignment of mortgage in which the nominee of a mortgagee appears as assignor, and (B) a release of mortgage, as described in section 49-8, by a nominee of a mortgagee, the town clerk shall remit one hundred ten dollars of such fees to the state, such fees shall be deposited into the General Fund and, upon deposit in the General Fund, thirty-six dollars of such fees shall be credited to the community investment account established pursuant to section 4-66aa; the town clerk shall retain forty-nine dollars of such fees, thirty-nine dollars of which shall become part of the general revenue of such municipality and ten dollars of which shall be deposited into the town clerk fund; and the town clerk shall retain any fees for additional pages beyond the first page in accordance with the provisions of subdivision (2) of subsection (a) of said section 7-34a; and (2) for the fee collected upon a recording of (A) an assignment of mortgage in which the nominee appears as assignor, or (B) a release of mortgage by a nominee of a mortgagee, the town clerk shall remit one hundred twenty-seven dollars of such fee to the state, such fee shall be deposited into the General Fund and, upon deposit in the General Fund, thirty-six dollars of such fee shall be credited to the community investment account, and, until October 1, 2014, sixty dollars of such fee shall be credited to the State Banking Fund for purposes of funding the foreclosure mediation program established by section 49-31m; and the town clerk shall retain thirty-two dollars of such fee, which shall become part of the general revenue of such municipality.

(i) An assignment executed in accordance with this section shall operate to assign the interest of the assignor in the mortgage which is the subject of the assignment, even if such interest is, in fact, acquired by the assignor after executing such assignment or does not appear of record until after the execution of such assignment. Nothing in this subsection shall be construed to limit the effect of any assignment of mortgage debt recorded before, on or after October 1, 2006.

Credits

(1949 Rev., § 7114; 1975, P.A. 75-24; 1979, P.A. 79-602, § 70; 1983, P.A. 83-564, § 1; 1998, P.A. 98-147, § 1; 1998, June Sp.Sess., P.A. 98-1, § 88; 2006, P.A. 06-156, § 3; 2013, P.A. 13-184, § 97, eff. July 1, 2013; 2013, P.A. 13-247, § 81, eff. July 15, 2013.)

Notes of Decisions (31)

C. G. S. A. § 49-10, CT ST § 49-10
Current through General Statutes of Connecticut, Revision of 1958, Revised to January 1, 2015.

End of Document

OFFICE OF FISCAL ANALYSIS

Legislative Office Building, Room 5200

Hartford, CT 06106 ☞ (860) 240-0200

http://www.cga.ct.gov/ofa

EMERGENCY CERTIFICATION

HB-6704

AN ACT CONCERNING EXPENDITURES AND REVENUE FOR THE BIENNIUM ENDING JUNE 30, 2015.

OFA Fiscal Note

State & Municipal Impact: See Below

Explanation

The bill contains spending and revenue for the FY 14 - FY 15 biennium and includes spending adjustment for FY 13.

The bill includes: (1) appropriations in ten funds totaling $18.6 billion in FY 14 and $19 billion in FY 15 (sections 1 - 10), (2) provisions to implement the budget (sections 11 - 69), (3) $142 million in FY 13 General Fund deficiency appropriations (section 62), and (4) various policy changes that yield net revenue increases of $410.2 million in FY 14 and $330.1 million in FY 15 (sections 70-113).

APPROPRIATIONS

Sections 1 - 10 include appropriations totaling $18.6 billion in FY 14 and $19 billion in FY 15 as summarized in the table below.

Fund Summary of FY 14 and FY 15 Appropriations

Item	FY 14 $	FY 15 $
Gross Appropriations		
General Fund[1]	17,358,606,991	17,663,333,266
Special Transportation Fund	1,254,182,080	1,333,312,395

Additionally, the LIA population has continued its strong caseload increase, adding approximately 10,100 additional clients since June (a 12.7% increase), for a total population of 89,400 in April. The cost of these 10,100 clients represents approximately $75.8 million in additional expenditures.

The $6 million shortfall in Personal Services is primarily due to additional hiring and overtime associated with increased caseloads and modernization efforts.

Department of Correction (DOC) - $23.1 million

The agency's projected FY 13 budget shortfall is composed of:

- $24.1 million in Personal Services.

This shortfall is partially offset by lapsing funds of:

- $1 million in Inmate Medical Services.

The $24.1 million projected shortfall in the Personal Services (PS) account is primarily due to unachieved savings related to policy initiatives in the FY 13 Revised Budget. Based on current expenditure trends, the agency will achieve $9.3 million in PS savings in FY 13, or 30% of the $30.6 million in savings included in the FY 13 Revised Budget.

The $30.6 million in savings in the budget was spread across four major policy initiatives: (1) house arrest for certain offenders, (2) risk reduction credits, (3) intensive probation and (4) restructuring time off for correctional officers. Central to the savings assumptions related to these initiatives was the reduction in prison population of 3,750 inmates starting in FY 12. Since the start of the FY 12, the prison population has declined by approximately 1,250 inmates, or 2,500 fewer than necessary to achieve the assumed savings.

The $24.1 million projected deficiency is offset by a projected $1.0 million lapse in the Inmate Medical Services accounts. The lapse is due to a delay in hiring and lower than projected pharmacy costs.

Section 63 requires deficiency appropriations for the Adjudicated Claims account to be carried forward into FY 14 for claims which may settle late in the fiscal year.

Section 64 allows the Comptroller to transfer funds among Medicaid accounts prior to closing the current fiscal year. This could prevent funding in certain Medicaid accounts from lapsing or other accounts ending the year deficient.

REVENUE

Sections 70 - 113 include various revenue provisions and are identified below:

General Fund Revenue Impact (in millions)

Bill Section	Description of Change	FY 14 $	FY 15 $
70	Implement a Tax Amnesty Program	35.0	(7.0)
71 & 109	Transfer from the Tobacco and Health Trust and Stem Cell Research Funds	19.5	16.0
72	Adjust the Cap on Insurance Premiums Tax Credits	18.7	18.7
73 & 74	Extend the Surcharge on Corporate Income Tax	44.4	74.0
75	Alter Eligibility for Film Tax Credits	2.0	4.0
76	Extend the Electric Generation Tax	17.5	-
77, 78 & 113	Eliminate the Transfer to the Municipal Revenue Sharing Account	92.4	97.9
77 & 78	Establish a 60-day Exemption from the Use Tax for Boats	(2.0)	(2.0)
77 & 78	Eliminate Luxury Tax on Boats	(0.1)	(0.1)
79	Re-establish the Sales Tax Exemption on Clothing under $50	-	(11.5)
80 & 81	Implement Alternative methods for the Collection of the Sales and Use Tax	10.0	15.0
82	Require Wholesalers to Remit Sales Tax on Cigarettes	2.6	2.6
83	Reduce the Earned Income Tax Credit	21.1	11.0
84, 85 & 86	Establish Keno	3.8	27.0

87, 88 & 102	Transfers from the Special Transportation Fund	91.3	18.4
89	Transfer from the Probate Fund	1.0	-
90 & 91	Authorize Restructuring of Debt from Economic Recovery Notes	-	-
92	Delay Amortization of Historical GAAP Deficit	-	-
93 & 94	Payments to Towns	-	-
95	Authorize $40 million in Bonds to Pay for Tax Credits Claimed per the Urban and Industrial Site Reinvestment Program	20.0	20.0
96	Alter the Applicable Assessment Rates for Certain Properties in Hartford	-	-
97 & 98	Increase Fees for Mortgage Recording	5.4	5.4
99	Transfer from the Connecticut Resources Recovery Authority (CRRA)	35.0	-
100 & 101	Transfer from the Public Education and Governmental Programming Account	3.4	3.5
103 & 104	Transfer from the Banking Fund	8.0	3.0
105	Transfer from the Regional Greenhouse Gas Initiative (RGGI)	-	5.0
106 & 107	Transfer from the Clean Energy Finance and Investment Authority (CEFIA)	6.2	24.2
108	Transfer from the Municipal Video Competitiveness Account	5.0	5.0

17	-	215	215
18	-	215	215
TOTAL	624	669	45

Section 92 reduces, from 15 to 13 years, the statutory term to extinguish the GAAP deficit by delaying the first payment from FY 14 to FY 16. This delay removes the need to appropriate funding in each of FY 14 and FY 15, thereby increasing the appropriation requirements for the remaining years because the amortization term required by law is reduced by two years.

Section 93 and 94 establish the following additional Local Capital Investment Program (LoCIP) purposes: (1) bikeways and greenways, (2) land acquisition, including for open space, and costs involved in making land available for public uses, (3) acquisition of technology related to implementation of DOE's Common Core State Standards, and (4) technology upgrades, including for improvements to expand public access to government information through e-portals and kiosks. They also allow LoCIP funds to be used for the following purposes in FY 13 and FY 14: (1) snow removal equipment, (2) capital expenditures made to improve public safety, and (3) capital expenditures made to facilitate regional cooperation.

Section 95 establishes a mechanism by which holders of Urban and Industrial Sites Reinvestment tax credits may redeem up to $20 million in aggregate credits in each year of the biennium through a bond-funded cash payment. This results in a $20 million GF revenue gain in each of FY 14 and FY 15 because these credits would otherwise have been redeemed against a GF revenue stream in the absence of this provision.

The credit redemption is financed through an authorization for $40 million bonding in GO bonds, effective July 1, 2013. The GF debt service cost associated with the bonds is $61 million over the 20 year term of issuance of the bonds. The cost is comprised of $21 million in interest cost and $40 million in principal payments. The figures assume that the bonds will be issued at a 5% rate of interest.

Section 96 lowers the assessment ratio in the City of Hartford for apartment or mixed-use dwellings that are newly created or converted by the Capital Region Development Authority within the Capital City Economic Development District. This shifts the tax burden away from these properties to other properties in the city.

Sections 97 and 98 increase certain mortgage recording fees from $53 to $159. This will result in a General Fund revenue gain estimated to be up to $5.4 million in both FY 14 and FY 15 due to the remittance of a portion of the fee to the state. Municipalities will also realize a revenue gain, the extent of which is not known at this time. There is no impact to the Community Investment Act (CIA) as their portion of the fee is unchanged.

31 Mass.L.Rptr. 48
Superior Court of Massachusetts,
Suffolk County.

DIRECTV, LLC and
Dish Network, L.L.C.
v.
The COMMONWEALTH
of Massachusetts,
Department of Revenue.

No. 10–0324–BLS1. | Nov. 26, 2012.

Synopsis

Background: Satellite television providers brought action against State, challenging constitutionality of statute imposing excise tax of five percent of gross revenues of satellite television providers. Parties filed motions for summary judgment.

Holdings: The Superior Court, Thomas P. Billings, J., held that:

[1] tax imposed on satellite television providers, but not cable television providers, did not unconstitutionally discriminate against interstate commerce, and

[2] tax on industry sector reasonably viewed as undertaxed did not violate equal protection.

State's motion for summary judgment allowed.

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFFS DIRECTV, LLC AND DISH NETWORK L.L.C.'S MOTION FOR SUMMARY JUDGMENT, DEFENDANT'S CROSS–MOTION FOR SUMMARY JUDGMENT, AND DEFENDANT'S MOTION TO STRIKE CERTAIN OF PLAINTIFFS' STATEMENT OF MATERIAL FACTS FOR NONCOMPLIANCE WITH RULE 56(e)

THOMAS P. BILLINGS, Associate Justice.

*1 In this action the plaintiffs, DIRECTV, LLC and DISH NETWORK. L.L.C. challenge the constitutionality of G.L. c. 64M, § 1 *et seq* ., the so-called "satellite tax," as violating the Commerce Clause of the United States Constitution and the Equal Protection Clauses of the United States and Massachusetts Constitutions. Now before the Court are cross-motions for summary judgment, and the defendant's motion to strike certain statements of material fact. Both sides agree—as, on the record before me, do I—that the issues can be decided as a matter of law.

For the following reasons, the plaintiffs motion for summary judgment is DENIED; the defendant's motion for summary judgment is ALLOWED; and the defendant's motion to strike is DENIED as moot.

BACKGROUND

The record reveals the following facts, which are largely undisputed. Pay television ("pay-TV"), or multi-channel video programming, provides the subscriber with multiple shows, movies, sporting events, news channels, and more. Massachusetts residents wishing to subscribe to pay-TV typically have two options. They can order their service from a cable provider that assembles its programming packages in Massachusetts and distributes them through a local cable infrastructure ("cable TV").[1] As an alternative, they can order the service through a provider that assembles its programming packages outside Massachusetts and beams its signals directly to subscribers' homes by way of orbiting satellites ("satellite TV").

1 The major cable providers are Comcast Corporation and Charter Communications, Inc., which are cable television providers, and Verizon Communications Inc. which is a wire-line telephone company. Verizon is not meaningfully different from the cable companies in terms of local assembly and ground-based distribution of Verizon pay-TV service.

Plaintiff DIRECTV is a limited liability company headquartered in El Segundo, California. Plaintiff DISH is a limited liability company headquartered in Englewood, California. Both plaintiffs offer pay-TV programming to customers in Massachusetts and throughout the United States via satellite. Satellite TV uses uplink centers to gather, merge, and encrypt television programming signals. DIRECTV's uplink centers are in Cheyenne, Wyoming, and Gilbert, Arizona; DISH's are near Castle Rock, Colorado, and Los Angeles, California. Each uplink center has its own "farm" of satellite dishes, studio equipment, and staff of trained employees. At the uplink centers, content signals are gathered, local advertising is inserted, and the programming packaged.

Satellite TV programming signals are then transmitted from the uplink centers to satellites that reside in geostationary orbit 22,300 miles above the Earth's atmosphere. From these satellites in space, the programming signals are transmitted directly to satellite TV customers, who receive the signals by way of a receiving dish mounted on or located near their homes. To gather local TV signals—that is, those from local broadcast stations such as WBZ or WHDH—the plaintiffs maintain local collection facilities in Massachusetts. These local collection facilities typically consist of a single room or closet containing receivers and antennas that gather content from local broadcast stations, and transmit that content via fiber-optic cables leased from telecommunications service providers in Massachusetts to their uplink centers west of the Mississippi. The fiber-optic cables that the plaintiffs lease for this purpose are also used by other persons transmitting data at the same time.

*2 During the time frame at issue in this case, January 1, 2006 through December 31, 2010, DIRECTV had local collection facilities in four Massachusetts cities; DISH had them in three Massachusetts cities. These local collection facilities are maintained by DIRECTV or DISH employees and/or by independent contractors. Because they typically consist of only a small room or closet, they are not staffed on a daily basis.

Both plaintiffs use authorized local retailers to sell their products and services to

Massachusetts subscribers. They also sell products and services at the Massachusetts stores of national retailers, such as Best Buy, Sears, BJ's Wholesale Club, and Kmart, with whom they have distribution agreements.[2] From January 1, 2007 through July 1, 2009, DIRECTV contracted with Halstead Communications and Multiband Corporation, each of which has employees in Massachusetts, for installation, maintenance, and/or repair services for those DIRECTV subscribers in Massachusetts. DISH contracted with Prime Service Center, which has employees in Massachusetts, for similar services during the same period.

2 Each plaintiff had distribution agreements with different retailers.

DISH also used its subsidiary, DISH Network Services, LLC, for installation, maintenance and repair. DISH Network Services had 176 employees in Massachusetts in 2006, 207 in 2007, 188 in 2008, 178 in 2009, and 141 in 2010. From January 1, 2006, through December 31, 2010, DISH Network Services leased facilities in Massachusetts, which it used to store office equipment and vehicles used for installation and repair. For that period, both plaintiffs paid a yearly personal property tax in Massachusetts.

The plaintiffs spend millions of dollars annually on assembly and distribution, largely on satellites located in outer space and at their uplink centers. They also pay for the right to locate their satellites in outer space and transmit their signals through the air using certain frequencies. These fees are paid to the federal government, not to Massachusetts or its local governments.

Cable TV providers, by contrast, use ground-based facilities, thousands of miles of cable, and thousands of Massachusetts-based employees to distribute their programming. All such programming must pass through terrestrial distribution points in Massachusetts called "headend" facilities, typically buildings of between 3000 and 4000 square feet.[3] Large satellite dishes, usually between five and seven feet in diameter and located outside the headend buildings, gather the cable programming signals from the airwaves and transmit them to hundreds of receivers located inside the buildings. Once inside the buildings, these signals are modulated, local advertising is inserted, and the cable programming is assembled into different packages.

3 In 2010, for example, cable TV providers operated and maintained more than 60 headend facilities in Massachusetts operated by a staff of trained employees. These providers also used contractors to build and install new equipment in the facilities.

Those packages are then distributed to cable TV subscribers through thousands of miles of fiber-optic and/or coaxial cable that is laid in trenches or hung from utility poles.[4] The signals travel through "trunk" lines located several feet underground and then distributed through "hubs" and "nodes" into "feeder" lines. Hubs and nodes are physical buildings or cabinet devices that are maintained on a neighborhood-by-neighborhood basis. Ultimately, cable TV signals reach each subscriber's home through a "drop" line running from the feeder line. This network of cables, hubs, nodes, and trunk, feeder, and drop lines are all located, under or above ground, in Massachusetts.

4 In 2011, cable TV providers used more than 30,000 miles of fiber-optic and coaxial wire to distribute programming to Massachusetts customers, and used independent contractors for some aspects of construction.

*3 Technologies and physical facilities aside, there is no dispute that both satellite TV and cable TV operate in a similar manner and provide pay-TV service in a similar way. Both offer a variety of programming packages. Both offer local broadcast stations. Both offer basic cable channels, such as CNN, ESPN and C–SPAN. Both offer premium cable channels such as HBO and Showtime. Both offer pay-per-view movies and events. Both offer on-demand programming services. Both offer music channel services. Both secure rights to distribute original programming from content providers. Both advertise their services through the internet, television, direct mail, newspaper circulars, and billboards.

Additionally, both cable TV and satellite TV use call centers to respond to new customers and existing customer inquiries. Both lease equipment to subscribers, such as set-up boxes and digital recording devices. Both use employees and independent contractors for installation, maintenance, and repair. Both pay Massachusetts taxes on their personal property located within the Commonwealth, such as the set-up boxes and DVR devices. They pay corporate income taxes to Massachusetts, and collect and remit sales taxes on qualifying sale-purchase transactions in Massachusetts. Both designate a certain percentage of their channel capacity to public access, educational and government programming. The parties do not dispute that the services are virtually identical, and that customers view them as similar and substitutable. They agree that the typical Massachusetts customer selects a service based on price, customer service, reception quality, and the breadth and types of programming offered.

The major players on both sides of the controversy are large interstate enterprises: DIRECTV is a corporation chartered in California and headquartered in Segundo; DISH is chartered in Colorado and headquartered in Englewood; Comcast is a Delaware corporation whose principal place of business is in Pennsylvania, and (as of 12/31/09) operated cable systems in 39 states; and Charter Communications is a Delaware corporation, headquartered in Missouri, and operates in 27 states. [5]

5 The parties' stipulation stops here, but it is judicially noticeable that the other major cable companies (Verizon, Cox Communications, Time Warner Cable, and RCN) likewise are headquartered outside of Massachusetts and have substantial regional or national footprints.

The major difference, and for the purposes of these motions the only relevant difference, between satellite TV and cable TV is the method by which the signals are assembled and distributed to customers. The former uses satellites located in outer space; the latter uses headends and an extensive web of ground-based equipment and cables all located in Massachusetts. The parties do not dispute that these different assembly and distribution systems translate into substantially different economic footprints in Massachusetts. From 2006 to 2010, Massachusetts major cable companies spent more than $1.66 billion om capital improvements, $303.3 million in 2010 alone, including investments in headend facilities, cable network, vehicles, and customer equipment. In 2010, major

Massachusetts cable companies employed almost 5000 people in the Commonwealth, with a combined payroll of $357 million. The household spending of these employees contributed an additional $274.4 million in economic activity and supported more than 1,800 additional jobs in other industries in Massachusetts.

*4 The different assembly and distribution systems also translate into different revenue streams for local governments. To place cables under or above ground, and to provide cable services to customers in a particular locality, cable companies must secure permission from local governments, in exchange for which they pay franchise fees to those municipalities in which they operate. The typical franchise fee is 3–5% of gross revenue from sales to subscribers within any given area. In 2010 this resulted in more than $63.3 million in revenue for cities and towns in Massachusetts. In addition to the fees, the typical, non-exclusive, franchise agreement requires that the cable TV provider meet certain obligations, including: meeting service quality and customer service standards; setting aside channels for public, educational, and governmental channels; providing services, facilities, and equipment to localities to support those channels; and providing free service to municipal buildings, schools, and libraries. Massachusetts municipalities also impose an average charge of 1.09% above the franchise fee for the financial support of public, educational, and government programming.

Satellite TV, on the other hand, hires far fewer employees; does not invest billions of dollars to build, service, or maintain facilities in Massachusetts; does not bargain for rights-of-way or pay franchise fees to local governments; and has no obligations to the local municipality similar to those of cable TV. While satellite TV providers still spend millions annually on employment, assembly, and distribution, that money is spent primarily at the providers' uplink centers, all located outside Massachusetts. The plaintiffs do hire independent contractors in Massachusetts to maintain their collection facilities and for installation, maintenance, and repair of their equipment.

The New England Cable & Telecommunications Association ("NECTA") is a regional trade association that represents the interests of substantially all the private cable companies in Massachusetts. Beginning in 2008, NECTA started lobbying for the imposition of an excise tax on satellite TV providers to achieve tax parity with cable TV companies. NECTA representatives inundated legislators with written materials and in-person meetings, and NECTA's president Paul Cianelli, made statements to the press and the public to the effect that the satellite TV providers enjoyed a special tax exemption. In early June, 2009, NECTA created a website designed to engender support for the tax. Comcast joined NECTA's campaign.

The thrust of NECTA's argument was that cable companies paid franchise fees, while satellite did not, and that cable also paid substantially greater real and personal property taxes to local government than satellite; there was therefore what cable repeatedly called a "tax parity" issue.[6] Some of the communications also mentioned the cable companies had a large real estate footprint and employed thousands locally, see *supra,* whereas the satellite companies had almost no real estate in Massachusetts and far fewer local employees.

6 Some of NECTA's lobbying materials refer to the measure as the "Massachusetts Tax Equalization Act." Satellite, meanwhile, was urging legislators to "Support Fair Taxation in the Video Marketplace" by "Reject [ing] Senate Bill 1314." (Jt.App.Ex.47, 54)

*5 On or about January 14, 2009, Senator Michael Morrissey filed Senate Bill 1314, which initially proposed a 5% excise tax on both cable and satellite providers, but allowed cable companies to offset the tax with a credit for property taxes and franchise fees. Cianelli drafted the language for Senate Bill 1314, with the help of NECTA's outside counsel. At a hearing before the Joint Committee on Revenue on April 9, 2009, Cianelli proposed an amendment that would impose the 5% tax only on satellite companies, not on cable companies. A representative from the Satellite Broadcasting and Communications Association testified in opposition. Senate Bill 1314 was never voted out of the Committee.

Earlier, in July, 2008, the Legislature had authorized the formation of the Special Committee on Municipal Relief as a joint bipartisan effort of the Senate and the House of Representatives to promote fiscal stability in the Commonwealth. NECTA lobbied members of the Special Committee to recommend the excise tax on their report to the Legislature. The Special Committee held a public hearing on December 3, 2008.

On May 8, 2009, the Special Committee released a report with recommendations, as well as draft legislation, that would impose a 5% excise tax on both cable and satellite TV providers, and allowed a credit for cable TV companies for franchise fees. Lobbyists for NECTA and Comcast then campaigned to change the language of the proposed excise tax so that it applied only to satellite TV providers. On May 21, 2009, the Senate passed an amendment to the House Bill making appropriations for fiscal year 2010 that imposed an excise tax of five percent of gross revenues of satellite TV providers, but not cable TV providers.

Members of the Committee of Conference finalized the details and submitted the appropriations bill, HB 4129, to a vote by the House and Senate. HB4129 included the 5% excise tax on satellite TV. The Legislature passed the bill on June 19, 2009, and Governor Patrick signed the FY 2010 General Appropriation Act, St.2007, c. 27, into law on June 29, 2009, with the satellite tax as one of many outside sections. See *id.,* § 61 ("FY 2010 Appropriations Act"). The tax was codified as G.L. c. 64M, Taxation of Direct Broadcast Satellite Service.[7] Between August 2, 2009, and November 30, 2010, it generated approximately $16,972,698 in revenue for the Commonwealth.

7 General Laws c. 64M, § 2, the pertinent statutory provision, is entitled "Excise on direct broadcast satellite service; rate; time of payment" and reads as follows:

> An excise is hereby imposed upon the provision of direct broadcast satellite service to a subscriber or customer by any direct broadcast satellite service provider in an amount equal to 5 per cent of the direct broadcast satellite service provider's gross revenues derived from or attributable to such customer or subscriber. A direct broadcast satellite service provider shall pay the excise to the commissioner at the time provided for filing the return required by section 16 of chapter 62C.

The plaintiffs filed their Amended Complaint in this case on April 1, 2011, seeking a declaratory judgment to the effect that G.L. c. 64M, § 1 *et seq.* violates the Commerce Clause of the United States Constitution (Count I); the Equal Protection Clause of the United States Constitution (Count II); and the Equal Protection Clause of the Massachusetts Constitution (Count II). The gist of their Commerce Clause argument is that the imposition of the tax has a discriminatory effect in that it protects and enhances the Massachusetts economy at the expense of interstate competition. They further argue that the Legislature enacted the excise tax with a discriminatory purpose; that is, to reward cable TV providers for their local economic activities and to penalize satellite TV providers for failing to invest and operate in the Commonwealth. The tax, the plaintiffs contend, confers an unfair advantage on cable companies and a competitive disadvantage on satellite companies, and is excessive in relation to the local benefits bestowed by the cable providers.

*6 With respect to their equal protection claims, the plaintiffs take the position that the satellite-only tax serves no legitimate public purpose and that there is no rational basis for discrimination between satellite TV and cable TV. The only purpose of the differential treatment, according to the plaintiffs, is to serve the parochial economic interests of local cable companies and government entities. They seek, in addition to a declaratory judgment, a permanent injunction against the enforcement of the statute and a refund of taxes already paid.

Defendant Department of Revenue ("Department") first responds that there is no violation of the Commerce Clause where satellite TV and cable TV are not similarly situated. In that respect, the Department points out that the two sectors have different technologies, equipment, regulatory responsibilities, and fiscal obligations to local government. That satellite TV and cable TV are not similarly situated, the Department argues, disposes of the plaintiffs' claim of unlawful discrimination against interstate commerce. Furthermore, the Department contends that the plaintiffs' have failed to adduce sufficient evidence that the Legislature purposefully discriminated against satellite TV, where the clear purpose of the act was revenue generation at a time of fiscal constraint, not economic protectionism. As to the plaintiffs equal protection claim, the Department asserts that the tax statute has a fair and rational relationship to the Legislature's efforts to raise state and local revenue. Finally, the Department argues that there can be no refunds absent a request brought before the Appellate Tax Board through the statutory abatement process.

DISCUSSION

Summary judgment is appropriate where, viewing the evidence in the light most favorable to the non-moving party, all material facts have been established and the moving party is entitled to judgment as a matter of law. *Cabot Corp. v. AVX Corp.,* 448 Mass. 629, 636–637, 863 N.E.2d 503 (2007); Mass. R. Civ. P. 56(c). "The moving party must establish that there are no genuine issues of material fact, and that the nonmoving party has no reasonable expectation of proving an essential element of its case."*Miller v. Mooney,* 431 Mass. 57, 60, 725 N.E.2d 545 (2000). See also *Pederson v. Time, Inc.,* 404 Mass. 14, 16–17, 532 N.E.2d 1211 (1989). When parties file cross-motions for summary judgment, the court adopts what has been described as a "Janus-like" dual perspective to view the facts for purposes of each motion through the lens most favorable to the nonmoving party. *Allstate Ins. Co. v. Occidental Int'l, Inc.,* 140 F.3d 1, 2 (1st Cir.1998). Each of the moving parties bears the burden of affirmatively demonstrating the absence of a triable issue as to its respective claim. *Lev v. Beverly Enterprises–Massachusetts, Inc.,* 457 Mass. 234, 237, 929 N.E.2d 303 (2010).

1. The Commerce Clause.

Article 1, § 8, cl. 3 of the United States Constitution expressly authorizes Congress to regulate commerce among the states. The Commerce Clause is more than an affirmative grant of power, however; it also has a "negative sweep," known as the "dormant" or "negative" Commerce Clause, by which "[a] State is ... precluded from taking any action which may fairly be deemed to have the effect of impeding the free flow of trade between States." [8] *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274, 278, 97 S.Ct. 1076, 51 L.Ed.2d 326 n .7 (1977).

8 This construction is not universally embraced, even in high places, but it is the law of the land. See *General Motors Corp. v. Tracy,* 519 U.S. 278, 312–13, 117 S.Ct. 811, 136 L.Ed.2d 761 (1997) (Scalia, J., concurring) and cases cited.

*7 "The paradigmatic example of a law discriminating against interstate commerce is the protective tariff or customs duty, which taxes goods imported from other States, but does not tax similar products produced in State."*West Lynn Creamery v. Healy,* 512 U.S. 186, 193, 114 S.Ct. 2205, 129 L.Ed.2d 157 (1997). The dormant Commerce Clause sweeps more broadly than this, however, and generally

> prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.... Thus, state statutes that clearly discriminate against interstate commerce are routinely struck down ... unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism.

Id. at 192 (invalidating order by Massachusetts Department of Agriculture imposing monetary assessment on fluid milk, two-thirds of which was produced out of state, and distributing the proceeds to Massachusetts dairy farmers).

A dormant commerce clause challenge requires "a sensitive, case-by-case analysis of the purposes and effects" of a regulatory measure " 'to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce.' " *Id.* at 201 (citation omitted). Discrimination "simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste*

Sys. v. Department of Envtl. Quality, 511 U.S. 93, 99, 114 S.Ct. 1345, 128 L.Ed.2d 13 (1994) (striking down surcharge for disposal of solid waste generated out of state).

A statute may discriminate against out-of-state interests in any of three ways: (1) it may be discriminatory on its face; (2) it may have a discriminatory effect; or (3) it may have a discriminatory intent.[9] See *Amerada Hess Corp. v. Director, Division of Taxation, New Jersey Dep't of the Treasury,* 490 U.S. 66, 75, 109 S.Ct. 1617, 104 L.Ed.2d 58 (1989). The burden of establishing unlawful discrimination is upon the party challenging the validity of the statute. *Lenscrafters, Inc. v. Robinson,* 403 F.3d 798, 803 (6th Cir.2005). A law that discriminates in favor of in-state business and against its out-of-state, but otherwise similarly situated, competition is "virtually per se invalid," and will survive only if it "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives."*Kentucky Dept. of Rev. v. Davis,* 553 U.S. 328, 338, 128 S.Ct. 1801, 170 L.Ed.2d 685 (2008) (upholding state income tax exemption for interest earned municipal bonds of in-state, but not out-of-state, issuers)."Absent discrimination for the forbidden purpose, however, 'the law will be upheld unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits.' " *Id.* at 338–339 (citation omitted).

9 The plaintiff do not argue that the satellite tax statute is discriminatory on its face, and the Court agrees.

The purpose of the commerce clause is not to relieve those engaged in interstate commerce from their just share of the state tax burden, even though it increases the cost of doing business. See, e.g., *Western Live Stock v. Bureau of Revenue,* 303 U.S. 250, 254, 58 S.Ct. 546, 82 L.Ed. 823 (1938). Nor are states prohibited from "structuring their tax systems" in a nondiscriminatory manner "to encourage the growth and development of intrastate commerce and industry."*Boston Stock Exchange v. State Tax Comm'n,* 429 U.S. 318, 336–337, 97 S.Ct. 599, 50 L.Ed.2d 514 (1977) (sustaining challenge to New York law imposing a greater tax burden on out-of-state securities sales than sales conducted within New York); see also *West Lynn Creamery,* 512 U.S. at 199 n. 15 ("it is undisputed that States may try to attract business by creating an environment conducive to economic activity").

***8 [1]** In this case, the satellite providers maintain that the Satellite Service Tax discriminates against interstate commerce in both effect and purpose.

A. Discriminatory Effect.

"Conceptually, of course, any notion of discrimination assumes a comparison of substantially similar entities."*General Motors Corp. v. Tracy,* 519 U.S. 278, 299, 117 S.Ct. 811, 136 L.Ed.2d 761 (1997) ("*Tracy*"). The threshold question in making a determination as to discrimination, therefore, is "whether the companies are indeed similarly situated for constitutional purposes."*Id.;* see *Lenscrafters,* 403 F.3d at 804.The plaintiffs argue that, because they operate in the same market as cable TV providers, and are thus competitors, they are similarly situated for constitutional purposes. The Department argues that because satellite and cable have different structures, methods of operation, and regulatory obligations, they are not similarly situated. The Department has the better of the argument.

Tracy was a challenge to the application of Ohio's general sales and use tax to interstate natural gas transmission companies, where local distribution companies ("LDCs") were exempt. The court observed that LDCs were heavily regulated territorial monopolies, burdened by "a typical blend of limitation and affirmative obligation."Each LDC was required to submit annual forecasts of supply and demand; to "comply with a range of accounting, reporting and disclosure rules"; to obtain PUC permission before it could issue securities or enter into certain contracts; to submit to detailed regulation of rates, termination of service, and backup supply; and to serve all members of the public in its geographic territory without discrimination. 519 U.S. at 295–97.

> The fact that the local utilities continue to provide a product consisting of gas bundled with the services and protections summarized above, a product thus different from the marketers' unbundled gas, raises a hurdle for GMC's [[10] claim that Ohio's differential tax treatment of natural gas utilities and independent marketers violates our "virtually *per se* rule of invalidity" prohibiting facial discrimination against interstate commerce.

10 General Motors Corporation, a large industrial consumer of natural gas for its manufacturing plants in Ohio, purchased nearly all of it directly from independent out-of-state marketers. 519 U.S. at 285.

Id. at 297–98.That the two business models competed, to a degree, for the same customers did not mean that the state could not differentially tax their products. To the contrary, the court saw this as reason for concern that equating the highly regulated LDCs, for tax purposes, with the comparatively unregulated interstate marketers could "affect[ ] the overall size of the JDCs' customer base," thereby degrading their ability "to serve the captive market where there is no such competition."*Id.* at 307.

The plaintiffs rely in large part on *Bacchus Imports, LTD. v. Dias,* 468 U.S. 263, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984); *Family Winemakers of California v. Jenkins,* 592 F.3d 1 (1st Cir.2010); and *Island Silver & Spice, Inc. v. Islamorada,* 542 F.3d 844 (11th Cir.2008) to support their contention that cable TV and satellite TV are similarly situated and so must be identically taxed. In all three of these cases, however, the courts concluded that the discriminatory statute or regulation was based entirely on protectionist distinctions between in-state and interstate businesses. See *Amerada Hess,* 490 U.S. at 77 and discussion, *infra.*

*9 In *Bacchus,* the United States Supreme Court held the Hawaii excise tax on liquor because it exempted okelehao and fruit wines. "Okelehao is a brandy distilled from the root of the ti plant, an indigenous shrub of Hawaii," and pineapple wine was also manufactured locally. 468 U.S. at 265.There was clear legislative history demonstrating that the reason for the tax exemptions was " 'to encourage and support the establishment of a new industry" within Hawaii. *Id.* at 271.The tax exemption was thus discriminatory in both purpose and effect.

Similarly, in *Family Winemakers,* the First Circuit struck down as discriminatory a Massachusetts statute that allowed only "small" wineries to obtain a license that allowed them to ship wine in three ways: directly to consumers, through wholesalers, or through retail distribution. 592 F.3d at 4. "Large" wineries, by contrast, had to choose between applying for a license that allows them to distribute their product directly to consumers, or distribute wine exclusively through wholesalers; they could not do both. *Id.* All wineries in Massachusetts are "small," in that they produce less than 30,000 gallons of grape wine annually [11]; there are no "large" wineries in Massachusetts. *Id.* The Court held that the gallonage cap changed the competitive balance so as to benefit significantly the Massachusetts wineries and burden significantly the out-of-state wineries, and that "[t]he advantages afforded to 'small' wineries bear little relation to the market challenges caused by the relative sizes of the wineries."*Id.* at 5. Added to this, as in *Bacchus,* was compelling evidence of a protectionist purpose. [12] This made the law " 'virtually per se invalid," salvageable only upon a showing that " 'it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.' " *Id.* at 18–19, quoting *Kentucky Department of Revenue v. Davis,* 128 S.Ct. at 1808.

11 There was legislative history suggesting that the exemption for non-grape fruit wine was inserted to prevent a particular Massachusetts winery from exceeding the 30,000 gallon limit.

12 The statute replaced an earlier vision which explicitly made the combined-distribution license available only to in-state wineries, and had recently been ruled unconstitutional. The sponsor of the new legislation explained to the General Court that " 'with the limitations that we are suggesting in the legislation, we are really still giving an inherent advantage indirectly to the local wineries.' " 592 F.3d at 12–13.See also the preceding footnote.

In *Island Silver,* a town ordinance restricted so-called "formula" retailers (large retail chains) to a certain square footage and frontage, limited so as to be incompatible with the large area that these nationally branded retailers require. 542 F.3d at 846.The effect was to prevent the plaintiff, a local mixed use retailer, from selling its real estate to a developer planning to establish a Walgreen's drugstore on the same footprint.*Id.* at 845.The Eleventh Circuit held that the provision was subject to heightened scrutiny because it effectively eliminated all new interstate retailers. *Id.* at 846–847.Although the purported purpose of the law—preserving a small town character —was deemed "legitimate" in theory, the number of existing chain stores and dearth of historic structures in the vicinity of Island Silver's property supported the district court's finding that "[Islamorada] has not demonstrated that it has any small town character to preserve," and thus had "failed to provide a legitimate local purpose to justify the ordinance's discriminatory effects."542 F.3d at 847–48. [13]

13 Other stated justifications-encouragement of small scale and water-oriented uses, preservation of the natural environment, and avoidance of increased traffic congestion, litter, garbage and rubbish-were also rejected as inaptly served by the ordinance. The court was polite enough not to observe that what the ordinance *did* serve tolerably well was the interests of the local business community.

*10 All three of these cases—none of which involved explicit, or even very precise, discrimination between intra- and interstate commerce—might fairly be regarded as close, were it not for the clarity of the legislative history. The present case is different, however, in a more fundamental respect. The dormant Commerce Clause protects the interstate *market,* not particular interstate firms, or even particular structures or methods of operation within a market.*Exxon Corp. v. Governor of Maryland,* 437 U.S. 117, 127–28, 98 S.Ct. 2207, 57 L.Ed.2d 91 (1978). Differential tax treatment of different modes of operation is not unconstitutional, where the "different effect ... on these two categories of companies results solely on the nature of their businesses, not from the location of their activities."*Amerada Hess,* 490 U.S. at 78 (holding that state tax code denying deduction for federal windfall profit tax on crude oil did not unconstitutionally favor local, independent retailers over large interstate oil companies).

It should come as no surprise, therefore, that every court to have considered the issue so far has concluded that the Commerce Clause does not prohibit differential taxation of providers that deliver programming by satellite as opposed to cable. See, e.g., *DIRECTV, Inc. v. Treesh,* 487 F.3d 471, 480 (6th Cir.2007) ("*Treesh* "), *cert. denied,*552 U.S. 1311, 128 S.Ct. 1876, 170 L.Ed.2d 746 (2008); *DIRECTV, Inc. v. North Carolina,* 178 N.C.App. 659, 667, 632 S.E.2d 543 (2006) ("*North Carolina* "); *DIRECTV, Inc. v. Levin,* 128 Ohio St.3d 68, 74, 941 N.E.2d 1187 (2010), *cert. denied,*— S.Ct. —— (6/25/12) ("*Levin* "); *DIRECTV, Inc. v. Tolson,* 498 F.Supp.2d 784, 800 (E.D.N.C.2007) (dismissing the satellite companies' complaint on other grounds but citing with approval *Treesh* and *North Carolina*).

All four of these cases involved sales taxes, though they examined two distinct systems. In *North Carolina* and *Levin,* North Carolina and Ohio had imposed a straightforward sales tax on satellite providers but not on cable providers. By the time of the *Tolson* decision, however, the North Carolina legislature had overhauled the tax code so that both cable and satellite companies paid sales tax at the same rate, but cable providers were relieved of paying franchise taxes to the municipalities in which they operated; instead, the state distributed sales tax revenues from cable and satellite providers to local governments, some of which had previously received franchise revenues. The new North Carolina law was very similar to the Kentucky system earlier upheld in *Treesh.*

All four courts rejected the satellite companies' challenges, reasoning that the dormant Commerce Clause protects the interstate market for a particular product, but not the particular structure or method of operation in a retail market. *Treesh,* 487 F.3d at 480.Accord *Levin,* 128 Ohio St.3d at 75, 941 N.E.2d 1187; *North Carolina,* 178 N.C.App. at 667–668, 632 S.E.2d 543.These courts have simply applied, to the pay TV industry, the holdings in *Amerada Hess* and *Exxon* that there is no violation of the Commerce Clause when differential tax treatment has nothing to do with the geographical location of the companies or their economic activities, and everything to do with the manner by which they distribute programming. See, e.g., *DIRECTV v. Treesh,* 469 F.Supp.2d 425, 439 (E.D.Ken.2006), *aff'd,*487 F.3d 471, 480 (6 th Cir.2007). Although under the *Exxon* rule, the dormant Commerce Clause would prohibit discrimination against the interstate market for multichannel video programming, it does not prohibit a differentiation between programmers in that interstate market who deliver programming by satellite and those who deliver by cable. *Id.* at 440.

*11 In the present case as in those, there can be no suspicion that the tax in question was intended to protect local pay-TV providers from out of state competition; all of the competitors—satellite and cable—are large out-of-state companies with regional or national footprints. Moreover, although the satellite and cable companies offer much the same programming and thus compete for many of the same customers,[14] they go about it with different modes of operation, using very different physical infrastructures, and operating in markedly different regulatory environments, much as in *Tracy.*It follows that satellite TV and cable TV are not similarly situated for Commerce Clause purposes, and that the satellite tax does not discriminate against the satellite providers based on geography.

14 Cable providers, of course, are limited to the cities and towns that have granted them franchises. Satellite providers can reach all of these customers, and also those who live far beyond the reach of cable. In any event, "[a]lthough competing in different markets or offering different products generally means that entities are not similarly situated, see *Tracy,* 519 U.S. at 299, competing in the same market is not sufficient to conclude that entities are similarly situated, as *Tracy* made clear."*National Ass'n of Optometrists v. Brown,* 567 F.3d 521, 527 (9th Cir.2009).

B. Discriminatory Purpose.

The fact that cable and satellite providers are not similarly situated effectively sidelines any concern over the purpose behind their differential tax treatment. Nonetheless, the plaintiffs argue that the Legislature enacted the satellite-only tax with the intent to favor the local economy, thus purposefully discriminating against out-of-state interests in violation of the Commerce Clause. See, e.g., *Amerada Hess,* 490 U.S. at 75.The evidence they have provided of protectionist legislative intent, however, is singularly unconvincing.

The centerpiece of the plaintiffs' argument on discriminatory intent consists of multiple communications from NECTA, its lobbyist, and Comcast to members of the Legislature. Some of these argue that cable had a larger economic footprint in the Commonwealth and made significant investment in Massachusetts in terms of jobs and infrastructure, while satellite did not—evidence, according to the plaintiffs, of discriminatory intent on the part of the legislators thus lobbied.

Statements of lobbyists, however, can furnish only the most attenuated and unreliable evidence of legislative intent.

> Legislative history is problematic even when the attempt is to draw inferences from the intent of duly appointed committees of Congress. It becomes far more so when we consult sources still more steps removed from the full Congress and speculate upon

> the significance of the fact that a certain interest group sponsored or opposed particular legislation.

Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 120, 121 S.Ct. 1302, 149 L.Ed.2d 234 (2001).

The statements offered up in this case here are exemplary of the problems with this sort of evidence. The "local jobs" pitch [15] was made most directly in a letter sent by NECTA to every legislator, yet even here it is only one of several arguments for the tax:

15 This and, even less directly, the references to infrastructure improvements are the only arguments having even a whiff of economic protectionism, and that only by proxy; the cable companies are no more local Massachusetts concerns than the satellite companies are. Tax equity is not a protectionist purpose. Nothing in the record suggests that satellite companies are any less able than cable companies to provide local access programming, video service to schools, libraries and other public buildings, and donations to charity, and even if it were so, it would be a mode-of-operation issue, not an interstate commerce issue.

> Unlike cable companies, satellite providers pay no personal property or real estate taxes. Unlike cable, they do not pay to support public and government access channels. And unlike cable, they do not provide free video service to municipal buildings and free video and high-speed internet to schools and libraries.
>
> ***12** Nor do satellite companies make investments in the economy or community, as cable providers do. Comcast alone, for example, employs more than 5,000 people in Massachusetts who collect more than $336 million in salary and benefits. Over the past seven years, Comcast has made $1.8 billion in capital investments in Massachusetts while donating more than $15 million to charity.

(Jt.App.Ex.50, 51)

Other communications by NECTA, its members, and its lobbyists with legislators, other government officials and the public analyzed the legality of the bill and repeatedly intoned, "Tax parity is the goal," mentioning in-state jobs and infrastructure improvements only in passing or not at all. (Jt.App.Ex.37, 44, 45, 47–49, 52, 53, 61, 64–66, 69, 70, 72, 96) To suppose from this evidence that Massachusetts that the General Court as a whole—or even any individual legislator—voted for the satellite tax as a jobs measure, as opposed to a revenue-raising and tax parity measure, is conjectural to an impermissible degree.

The plaintiffs claim, however, to have it from the horse's mouth, in the form of statements reportedly made to Andrew Reinsdorf, senior vice president of government relations for DIRECTV, by "half a dozen to a dozen" legislators whose names he cannot remember. "My general recollection of those meetings," Reinsdorf testified, "was that generally most all of the legislators I met with, in part, relayed or expressed or voiced the view that cable has a significant local presence; that cable does PEG [16] programming; that cable employs lots of my constituents."He heard from someone else that Senator Rosenberg was "particularly adamant" on these issues. (Jt.App. Ex. 32 at 57–58, 61)

16 Public, educational and governmental.

Even putting aside the infirmities of this particular testimony, "statements attributed to individual legislators as to their motives or mixtures of motives in considering legislation are not an appropriate source from which to discover the intent of the legislation."*Administrative Justice of the Housing Court Dep't v. Commissioner of Admin.,* 391 Mass. 198, 205, 461 N.E.2d 243 (1984); *accord, Finch v. Commonwealth Health Ins. Connector Auth.,* 461 Mass. 232, 240 n. 6, 959 N.E.2d 970 (2012); *Boston Water & Sewer Comm'n v. Metropolitan Dist. Comm'n.,* 408 Mass. 572, 578, 562 N.E.2d 470 (1990).

Finally, the plaintiffs see evidence of discriminatory intent in what they call a "backdoor" process and the Legislature calls "outside sections." Although this device has been the subject of periodic criticism from individual legislators, the other branches of government, and the citizenry, the Supreme Judicial Court has been

> reluctant to reject the use of "outside sections" as a means to enact amendments to general legislation. "This court traditionally has avoided involvement in the internal workings of the Legislature in deference to the unique role of the Legislature and its expertise with regard to internal legislative processes."'"In these circumstances, mindful of the principle of separation of powers so carefully stated in art. 30 of the Declaration of Rights, this court should not infer specific constitutional procedures that the ... legislative branch[ ] ... must follow."

***13** *First Justice of Bristol Div. of the Juvenile Court Dept. v. Clerk–Magistrate of Bristol Div. of the Bristol Juvenile Court Dept.,* 438 Mass. 387, 408, 780 N.E.2d 908 (2003) (citations omitted). Outside section or no, the proposed measure was no secret from the satellite industry (which lobbied against it) or, apparently, from its customers. (Jt.App.Ex.54, 84) Finally, the plaintiffs make no connection between the use of the outside section process and any supposed intent to discriminate against interstate commerce.

In short: the plaintiffs have not shown that the satellite tax had any purpose beyond the obvious: raising revenue, by taxing an industry sector that was rationally viewed as undertaxed. Accordingly, where cable and satellite are not similarly situated, and where there is no evidence of discriminatory effect or purpose, the plaintiffs' claim of a commerce clause violation fails.

2. Violation of the Equal Protection Clause

[2] The plaintiffs additionally argue that the imposition of satellite tax violates the Equal Protection Clauses of the Constitutions of the United States (Am.XIV) and Massachusetts (Arts.I, X) because it arbitrarily distinguishes between similarly situated businesses without any rational basis related to a legitimate state policy. The analysis is the same under both constitutions. *Brackett v. Civil Service Comm'n,* 447 Mass. 233, 243, 850 N.E.2d 533 (2006). Absent a suspect classification or a fundamental right (neither of which is present here), however, there is no equal protection violation if the statutory distinction in question has a rational basis.*Armour v. City* *of Indianapolis,* —— U.S. ——, 132 S.Ct. 2073, 2080, 182 L.Ed.2d 998 (2012); *Finch* at 668–69.

" '[C]reating classifications and distinctions in tax statutes' " is a domain in which " '[l]egislatures have especially broad latitude." *Armour* at 2080, quoting *Regan v. Taxation With Representation of Washington,* 461 U.S. 540, 547, 103 S.Ct. 1997, 76 L.Ed.2d 129 (1983). "So long as any basis of fact can be reasonably conceived showing that the distinction made by a tax statute has a fair and rational relationship to the object sought to be accomplished, the legislative classification is not violative of equal protection principles." *Seiler Corp. v. Commissioner of Revenue,* 384 Mass. 635, 639, 429 N.E.2d 11 (1981).

The enactment of the satellite tax came at a time when Massachusetts was in the throes of a fiscal crisis. The Legislature was faced with a looming revenue shortfall, and it chose, as a small part of the solution, to tax a sector whose existing regulatory and fiscal obligations to the sovereign were reasonably perceived as modest when compared to those of the rest of the pay-TV industry. This was a plausible and entirely legitimate reason for the tax classification. "[T]he legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational."*Armour, supra.*The plaintiffs' claim of a violation of the equal protection clauses of both the United States Constitution and the Massachusetts Constitution therefore fails.

ORDER FOR JUDGMENT

*14 For the forgoing reasons, plaintiffs DIRECTV, L.L.C. and DISH NETWORK, LLC's Motion for Summary Judgment is DENIED. Defendant Commonwealth of Massachusetts, Department of Revenue's Motion for Summary Judgment is ALLOWED.

Judgment shall enter, declaring that Chapter 64M of the General Laws is lawful under Article 1, § 8, cl. 3 of the United States Constitution (the commerce clause) and under the equal protection clauses of the of the Fourteenth Amendment to the United States Constitution and Articles I and X of the Massachusetts Constitution.

Parallel Citations

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